Supreme Court, U.S.
FILED

97.294 MAY 21 1997

NO. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

DONALD S. JONES,

Petitioner,

v.

KURT PETERSON, Superintendent;
PHIL STANLEY, Superintendent; and
CHASE RIVELAND, Director,
Department of Corrections,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD HANSEN
Counsel of Record

ALLEN, HANSEN & MAYBROWN
1001 Fourth Ave., #4301
Seattle, Washington 98154
(206) 447-9681

114 pp

QUESTIONS PRESENTED

1. Whether it violated Petitioner's rights under the Confrontation Clause of the Sixth Amendment for the prosecutor to berate him during cross-examination for requesting, during a recess, that the prosecutor refrain from blocking Petitioner's view of the complainant during her testimony.

2. Whether it violated Petitioner's constitutional rights under the Confrontation and Due Process Clauses for the prosecutor, in closing argument, to criticize "a system that requires that child to have to walk in through those two big doors as a very, very small person and walk up here in front of twelve people, twelve grownups, whom they don't know, and sit in this chair in a courtroom such as this, with the defendant sitting right there, staring at them."

3. Whether it violated Petitioner's Sixth Amendment right to a jury trial to allow a social worker to present testimony in the form of her opinion "that this child had been sexually molested by [Petitioner]," that she believed the complainant was telling the truth, and that the alleged victim's behavior fit the pattern of somebody who had been sexually molested.

4. Whether the decision below, holding that Petitioner failed to show that numerous, constitutional errors at trial "so infected the

trial with unfairness as to make the resulting conviction a denial of due process," conflicts with this Court's holding in Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974), which applies a less onerous standard of review to cases where "the State has denied a defendant the benefit of a specific provision of the Bill of Rights" as occurred here.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED . . 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 9

I. THE PROSECUTOR'S DEROGATORY CROSS-EXAMINATION OF PETITIONER ABOUT HIS REQUEST TO SEE THE COMPLAINANT WHILE SHE TESTIFIED, AND RELATED CLOSING ARGUMENTS THAT CRITICIZED THE DEFENDANT FOR LOOKING AT THE COMPLAINANT WHILE SHE WAS ON THE WITNESS STAND, VIOLATED PETITIONER'S CONFRONTATION RIGHTS UNDER THE SIXTH AMENDMENT, AND HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL 9

II. ARGUING FACTS OUTSIDE THE RECORD CONSTITUTED A FURTHER VIOLATION OF THE CONFRONTATION CLAUSE AND DUE PROCESS 13

III. IMPROPER OPINION TESTIMONY INVADED THE PROVINCE OF THE JURY AND VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO HAVE THE JURY DECIDE EACH ISSUE . . . 17

IV. THE DISTRICT COURT APPLIED THE WRONG STANDARD OF REVIEW TO THIS DAMAGING ARRAY OF CONSTITUTIONAL VIOLATIONS . . . 21

V. AS A MATTER OF LAW, THESE NUMEROUS, CONSTITUTIONAL ERRORS CANNOT BE DEEMED HARMLESS 26

CONCLUSION 28

TABLE OF AUTHORITIES

Federal Cases Cited

Argersinger v. Hamlin, 407 U.S. 25 (1972) 22

Berger v. United States, 295 U.S. 78 (1934) 28, 29

Brecht v. Abrahamson, 507 U.S. 619 (1993) 26

Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985), vac't & remanded on other grounds, 478 U.S. 1016 (1986) . . 24

Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983), cert. denied, 469 U.S. 920 (1984) 10

Carter v. Kentucky, 450 U.S. 288 (1981) 10

Coy v. Iowa, 487 U.S. 1012 (1988) 9, 15

Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991) 12, 13

Davis v. Wyrick, 766 F.2d 1197 (9th Cir. 1985), cert. denied, 475 U.S. 1020 (1986) 24

Donnelly v. DeChristoforo, 416 U.S. 637 (1974) . . . . . passim

Doyle v. Ohio, 426 U.S. 610 (1976) 10

Gomez v. Ahitow, 29 F.3d 1128
(7th Cir. 1994), cert. denied,
115 S.Ct. 1122 (1995) 14

Griffin v. California, 380 U.S. 609
(1965) 10, 22

Mahorney v. Wallman, 917 F.2d 469
(10th Cir. 1990) 25

Martin v. Parker, 11 F.3d 613
(6th Cir. 1993) 17, 28

Miller v. Lockhart, 65 F.3d 676
(8th Cir. 995) 25

O'Neal v. McAninch, 513 U.S. 432,
115 S.Ct. 992, 130 L.Ed.2d 947
(1995) 26, 27

Rogers v. Lynaugh, 848 F.2d 606
(5th Cir. 1988) 25

Romano v. Oklahoma, 512 U.S. 1
(1994) 23

Sizemore v. Fletcher, 921 F.2d 667
(6th Cir. 1990) 10

Thompson v. Borg, 74 F.3d 1571
(9th Cir.), cert. denied,
117 S.Ct. 227 (1996) 24

United States ex rel. Shaw v.
De Robertis, 755 F.2d 1279
(7th Cir. 1985) 14

United States v. Arenal, 768 F.2d
263 (8th Cir. 1985) 19

United States v. Cotnam, 88 F.3d
487 cert. denied, 117 S.Ct.
326 (1996) 26

United States v. Foster, 982 F.2d 551 (D.C. Cir. 1993) 16

United States v. Griffin, 579 F.2d 1104 (8th Cir.), cert. denied, 439 U.S. 981 (1978) 19, 29

United States v. Hasting, 461 U.S. 499 (1983) 27

United States v. Kinsey, 843 F.2d 383 (9th Cir.), cert. denied, 487 U.S. 1223 (1988) 19

United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993) 14, 17

United States v. McKoy, 771 F.2d 1207 (9th Cir. 1985) 19

United States v. McPhee, 731 F.2d 1150 (5th Cir. 1984) 16

United States v. Olano, 507 U.S. 725 (1993) 20, 21

United States v. Scop, 846 F.2d 135 (2nd Cir. 1988) 19

United States v. Whitted, 994 F.2d 444 (8th Cir. 1993), aff'd on rehearing, 11 F.3d 782 (1993) 20

Ward v. Whitley, 21 F.3d 1355 (5th Cir. 1994), cert. denied, 115 S.Ct. 1257 (1995) 25

Williams v. Kemp, 846 F.2d 1276 (11th Cir. 1988), cert. dismissed, 489 U.S. 1094 (1989), cert. denied, 494 U.S. 1013 (1990) . . . 24

State Cases Cited

Commonwealth v. Johnson, 417 Mass. 498, 631 N.E.2d 1002 (Mass. 1994) 9

State v. Donald Jones, 71 Wn. App. 798, 863 P.2d 85 (1993) . . . passim

Washington State Statutes Cited

RCW 9A.44.010 5
RCW 9A.44.073 5
RCW 9A.44.083 5

Federal Statute Cited

28 U.S.C. § 1254 2

United States Constitution Cited

Sixth Amendment . . . . . passim
Fourteenth Amendment 3, 9

Appendix

Appendix A -- Opinion of the United States Court of Appeals for the Ninth Circuit Dated February 20, 1997 . . . . . A1-A3

Appendix B -- Opinion of the United States District Court for the Western District of Washington A4-A40

Appendix C -- Opinion of the Washington State Court of Appeals A41-A75

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

DONALD S. JONES,

Petitioner,

v.

KURT PETERSON, Superintendent;
PHIL STANLEY, Superintendent; and
CHASE RIVELAND, Director,
Department of Corrections,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Ninth Circuit (App., infra, A1-A3) and the decision of the United States District Court (App., infra, A4-A40) are both unreported. The decision of the Washington State Court of Appeals (App., infra, A41-A75) is reported as State v. Donald Jones, 71 Wn. App. 798, 863 P.2d 85 (1993).

STATEMENT OF JURISDICTION

The Ninth Circuit delivered its opinion on February 20, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the

> right to a speedy and public trial, by an impartial jury . . . and . . . to be confronted with the witnesses against him; . . .

U.S. Const. amend. VI.

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> SECTION I. No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . .

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Petitioner Donald Jones was charged with one count of child molestation in the first degree (Count I) and one count of rape of a child in the first degree (Count II) in the King County Superior Court in Seattle, Washington, based on a single incident involving his girlfriend's daughter, Angela Hanson ("A"). See State v. Jones, 71 Wn. App. 798, 802, 863 P.2d

85 (1993); App. A41-A42. Jones had been living with A.'s mother in a duplex in the Seattle area when A. began causing problems in the household, lying and acting out sexually. See id.

Over objection, the trial court allowed opinion testimony by CPS worker Judy Mitchell that "this child had been sexually molested by Donnie." Jones, 71 Wn. App. at 812; App. A55. Mitchell also advised the jury that she believed the complainant's allegations. Id.[1] In response, Jones testified and described the incident that led to the criminal charges against him as follows:

> Jones testified that A. had climbed into bed with him, and they started discussing her recent sexual acting out. Jones

---

[1] Other inadmissible aspects of Mitchell's testimony included her opinion that the "behaviors of A., . . . were common behaviors of sexually abused children, specifically her propensity to sexually act out and her nightmares." 71 Wn. App. at 813; App. A57.

> alleged that A. reached out and touched him. Jones also testified that during the course of their discussion he did momentarily touch her vaginal area, but stated his touching her was not caused by any sexual motivation and he was not sexually aroused.

Id. The Washington Court clearly acknowledged that Jones "denied that he touched her for sexual gratification." Id. at 805; App. A45. Sexual gratification is the key element of both charges under Washington law. See RCW 9A.44.010(1)-(2); 9.A.44.073 and .083.

During trial, Petitioner's view was blocked by the prosecutor during her questioning of A. and defense counsel advised the trial judge during a recess, outside the presence of the jury, "that he could not see." 71 Wn. App. at 805; App. A45. The court found that the prosecutor's blocking "was inadvertent and told Jones that he could position himself

~~in a different spot where he could see the~~ witness." Id.

Later, during cross examination of the defendant (which consisted of a one page, verbal tirade), the prosecutor asked rhetorically whether the defendant was "frustrated because I was blocking your view from her such that you could not stare at her as she was testifying here; isn't that right? Isn't that right?" The defendant answered "Yes, I did." Id.[2] Petitioner's request to view A. then became the focus of the prosecutor's inflammatory closing argument condemning

---

[2] The cold text of the prosecutor's cross-examination clearly suggests that her voice was filled with anger and emotion, and this is verified by defense counsel's closing argument, where he described her demeanor as "very angry" and as "being upset." RT 405; ER 258. When he argued "She just wants to get up and yell at him and sit down," the prosecutor objected but was summarily overruled by the trial judge. RT 406; ER 259.

both him, and the entire criminal justice system, for requiring

> that child to have to walk in through those two big doors as a very, very small person and walk up here in front of twelve people, twelve grownups whom they don't know, and sit in this chair in a courtroom such as this, with the defendant sitting right there, staring at them.

Id., at 805-806; A46.

On appeal, the Washington Court of Appeals found numerous errors and concluded that, "[o]verall, the procedures followed at trial leave much to be desired." Id. at 826; App. A75. Nevertheless, the court held:

> The evidence was substantial, however, and included not only the victim's testimony but an eyewitness account of the incident and an admission by Jones that he touched A. We do not find that the cumulative effect of the errors deprived Jones of his right to a fair and impartial jury trial.

Id.

Petitioner exhausted his state claims, then filed a habeas corpus petition in the United States District Court for the Western District of Washington, where a Magistrate Judge issued a Memorandum Order granting Respondent's Motion for Summary Judgment dismissing the writ. See App. A4. However, the Magistrate Judge applied a narrow standard of due process to all of Petitioner's claims, even his specific, Confrontation Clause claim:

> [P]etitioner fails to show that the prosecutor's question "so infected the trial with unfairness as to make the resulting conviction a denial of due process."

App. A18 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). The Magistrate Judge rejected the other asserted claims under this same due process test. See App. A24, A28.

The Ninth Circuit Court of Appeals affirmed in a terse, unpublished decision that contained no discussion of Petitioner's legal claims. See App. A1-A3.

REASONS FOR GRANTING THE WRIT

I. THE PROSECUTOR'S DEROGATORY CROSS-EXAMINATION OF PETITIONER ABOUT HIS REQUEST TO SEE THE COMPLAINANT WHILE SHE TESTIFIED, AND RELATED CLOSING ARGUMENTS THAT CRITICIZED THE DEFENDANT FOR LOOKING AT THE COMPLAINANT WHILE SHE WAS ON THE WITNESS STAND, VIOLATED PETITIONER'S CONFRONTATION RIGHTS UNDER THE SIXTH AMENDMENT, AND HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL

In Coy v. Iowa, 487 U.S. 1012 (1988), this Court described the "right to meet face to face all those who appear and give evidence at trial" as "the irreducible literal meaning of the Clause." Id. at 1021 (quoting California v. Green, 399 U.S. 149, 175 (1970)) (emphasis in original). Accord: Commonwealth v. Johnson, 417 Mass. 498, 631 N.E.2d 1002

(Mass. 1994) (allowing child victim to face away from defendant unconstitutional).

Relatedly, it is well established, as a matter of constitutional law, that it is reversible error for a prosecutor to urge a jury to draw negative inferences from the valid exercise of any constitutional right. See, e.g., Doyle v. Ohio, 426 U.S. 610 (1976); Griffin v. California, 380 U.S. 609, 614 (1965) (comment on right to remain silent); Carter v. Kentucky, 450 U.S. 288 (1981); Sizemore v. Fletcher, 921 F.2d 667, 671 (6th Cir. 1990) (improper to comment on defendant's right to counsel); Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983) ("No prosecutor may employ language which denigrates the right of a criminal defendant to retain the counsel of his choice, or otherwise limits the fundamental due process rights of an

accused to present a vigorous defense"), cert. denied, 469 U.S. 920 (1984).

Intertwined with the confrontation issue are distinct instances of prosecutorial misconduct, for in addition to criticizing the defendant during cross-examination for "staring" at the victim, the prosecutor also presented a highly emotional argument based on the songs of a popular singer, Whitney Houston. See Jones, 71 Wn. App. at 805; App. A46. This argument had no conceivable relevance to any legitimate issue in the case, but was fashioned solely to arouse sympathy with its reference to "songs about our children . . . about how they will inherit the earth," and simultaneously provoke prejudice against the defendant for "sitting right there, staring," and even against the courts for requiring

> that child to have to walk in through those two big doors as a very, very small person and walk

> up here in front of twelve people, twelve grownups whom they don't know, and sit in this chair in a courtroom such as this.

Id. The prosecutor concluded her argument by again chastising the defendant because he "wants to have direct eye contact with her" with the result that "[s]he broke down and she cried and she told you she was afraid. She was afraid of who? Of Donnie." Id. at 806; App. A47.

In Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991), the court found prosecutorial misconduct requiring the granting of a habeas corpus petition where the prosecutor stated in closing argument "that he was 'offended' that Cunningham had exercised his Sixth Amendment right to a trial by jury." Id. at 1019. This conduct was described "as outrageous" because "[t]he prosecutor's comments improperly imply that Cunningham had abused our legal system in some way by

exercising his Sixth Amendment right to a jury trial." Id.

The prosecutor in this case did not merely "imply" that Jones "had abused our legal system" by exercising his right of confrontation, but condemned the entire system for requiring the victim to appear in court before a jury of "twelve grownups." The logical implications of this prosecution would be to dispense with the "system" altogether.

II. ARGUING FACTS OUTSIDE THE RECORD CONSTITUTED A FURTHER VIOLATION OF THE CONFRONTATION CLAUSE AND DUE PROCESS

The prosecutor engaged in further misconduct by making reference in closing to supposed testimony from "the CPS worker" who "told you that outside how upset and how disturbed and how frightened [the complainant] was so that she refused to walk through those two big doors again." Jones, 71 Wn. App. at 806; App.

A47. While CPS worker Mitchell did describe A. as "very upset" after she testified, there was no indication from her, or any other witness, that A. refused to enter the courtroom and continue her testimony.

Thus, the unfounded inference that A. had more testimony to offer that the jury never heard was factually erroneous, legally improper, and additional grounds for reversal. See United States ex rel. Shaw v. De Robertis, 755 F.2d 1279, 1281 (7th Cir. 1985) (prosecutor "invited the jury to rely on the unseen police report as containing additional evidence"); United States v. Kojayan, 8 F.3d 1315, 1321 (9th Cir. 1993) ("When a lawyer asserts that something not in the record is true, he is, in effect, testifying. . . . This is definitely improper."); Gomez v. Ahitow, 29 F.3d 1128, 1136-37 (7th Cir. 1994) ("prosecution may not, consistent

with due process rights and Sixth Amendment right to confrontation, 'seek to obtain a conviction by going beyond the evidence before the jury'"), cert. denied, 115 S.Ct. 1122 (1995).

Even if it had been true that A. "refused to walk through those two big doors again," this argument would still have improperly urged the jury to speculate about A.'s reasons, and unconstitutionally penalizes the defendant for exercising his constitutional right to a jury trial. As noted in Coy:

> That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.

487 U.S. at 1020.

The prosecutor then argued there were other crimes that the State was not able to charge:

> [T]he State has to be very, very careful which charges it brings because it has to be able to prove to you the specifics of, the specific parts of this crime, and to be told that it's only happened a number of times but not be able to draw on the specifics, a charge may not be brought for all those other times, but we know this is not the only time, we know she said it happened a number of times, and we know he has had access to her since she was a child.

Jones, 71 Wn. App. at 806; App. A47.

Courts have uniformly held that such references to uncharged crimes violates basic due process and require reversal of any resulting conviction. See, e.g., United States v. McPhee, 731 F.2d 1150, 1152-1153 (5th Cir. 1984) (closing argument that "we want you to find him guilty because of a bunch of other reasons" was a "foul blow" that "severely prejudiced McPhee's right to be tried only for the crime charged in the indictment."); United States v. Foster, 982 F.2d 551, 555 (D.C. Cir. 1993)

(reversible error to insinuate in closing argument "that the prosecution knew of crimes, other than the one charged" because "we have no reason to believe the jury discredited the prosecutor's 'other crimes' insinuations in finding Foster guilty."); Martin v. Parker, 11 F.3d 613, 615 (6th Cir. 1993) ("prosecutor wrongly introduced evidence of uncharged acts" in child sex abuse case); Kojayan, 8 F.3d at 1321.

III. IMPROPER OPINION TESTIMONY INVADED THE PROVINCE OF THE JURY AND VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO HAVE THE JURY DECIDE EACH ISSUE

The Washington State Court of Appeals conceded that CPS worker Mitchell's improper opinion testimony that "this child has been sexually molested by Donnie" and that she believed A.'s allegations, both constituted an "explicit statement of belief in Jones' guilt." State v. Jones, supra, 71 Wn. App. at 813;

App. A56. The court acknowledged "that no witness may testify as to an opinion on the guilt of the defendant, whether directly or inferentially." Id. (citations omitted). The court concluded:

> Mitchell's statement plainly indicated her opinion that she believed Jones had molested A. Therefore, the trial court's admission of this statement was error. The error is of constitutional magnitude because it invades the province of the jury, therefore it is harmless only if the untainted evidence is so overwhelming that it necessarily supports a guilty verdict.

Id. (citation omitted).[3]

In all criminal cases, it is well established that "[a] witness, however, may not give a direct opinion on the

---

[3] The Magistrate Judge concluded this claim "failed to raise a claim under the United States Constitution." See A36. However, the Magistrate Judge's opinion flatly contradicts the Washington Court of Appeals decision that this error "is of constitutional magnitude because it invades the province of the jury," a clear reference to the Sixth Amendment of the federal constitution. See A56.

defendant's guilt or innocence." United States v. Kinsey, 843 F.2d 383, 388 (9th Cir.), cert. denied, 487 U.S. 1223 (1988). In United States v. McKoy, 771 F.2d 1207 (9th Cir. 1985), the court held that any attempt to present "expert testimony" implying the defendant's guilt is unconstitutional. Id. at 1210-1211. Accord: United States v. Griffin, 579 F.2d 1104, 1110 (8th Cir.) cert. denied, 439 U.S. 981 (1978); United States v. Scop, 846 F.2d 135, 142 (2nd Cir. 1988) (such testimony is a "gross invasion of the province of the jury").

Testimony from a supposed expert[4] is especially damaging because it creates an "aura of expertise," which makes the danger of prejudice especially great. See, e.g., United States v. Arenal, 768

---

[4] As a CPS worker, Mitchell had limited training and education. See App. A57.

F.2d 263, 269 (8th Cir. 1985). In United States v. Whitted, 994 F.2d 444 (8th Cir. 1993), aff'd on rehearing, 11 F.3d 782 (1993), the court reversed the defendant's convictions for incest and sexual abuse because of the erroneous admission of "a doctor's opinion that sexual abuse has in fact occurred". 11 F.3d at 786. The court reasoned that "[a] doctor cannot pass judgment on the alleged victim's truthfulness in the guise of a medical opinion, because it is the jury's function to decide credibility", and concluded that "[t]he doctor's testimony invaded the jury's exclusive province to decide witness credibility." Id., at 786-87 (citing United States v. Azure, 801 F.2d 336, 339-41 (8th Cir. 1986)).[5]

---

[5] The court reversed even though the defendant did not object to the doctor's testimony, finding the erroneous admission of the doctor's opinion constituted plain error under United States v. Olano, 507 U.S. 725 (1993), and further that the

IV. THE DISTRICT COURT APPLIED THE WRONG STANDARD OF REVIEW TO THIS DAMAGING ARRAY OF CONSTITUTIONAL VIOLATIONS

The Magistrate Judge dismissed these egregious constitutional violations by applying a generic, due process test:

> Here, petitioner fails to show that the prosecutor's question "so infected the trial with unfairness as to make the resulting conviction a denial of due process."

App. A18 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)).[6] This reasoning misconstrues the Donnelly holding, where petitioner argued that an "ambiguous" remark by the prosecuting attorney, that "I honestly and sincerely believe that there is no doubt in this case, none whatsoever," constituted improper vouching. See 416 U.S. at 640,

---

"impermissible testimony greatly prejudiced Whitted." Id. at 787-88.

[6] It is impossible from the Ninth Circuit's perfunctory opinion to discern what legal standard was applied.

n. 6.[7] Based on this record, the Donnelly Court did apply a more relaxed, due process standard. See 416 U.S. at 643.

However, in applying a generalized unfairness standard, this Court specifically distinguished the case before it from the situation presented here, where a specific constitutional violation occurred and a higher standard must be applied:

> This is not a case in which the State has denied a defendant the benefit of a specific provision of the Bill of Rights, such as the right to counsel, Argersinger v. Hamlin, 407 U.S. 25 (1972), or in which the prosecutor's remarks so prejudiced a specific right, such as the privilege against compulsory self-incrimination, as to amount to a denial of that right. Griffin v. California, 380 U.S. 609 (1965). When specific guarantees of the Bill of Rights are involved, this Court has taken special care to

---

[7] The Court observed that this remark was "perhaps offered to rebut a somewhat personalized argument by respondent's counsel." Id.

> assure that prosecutorial conduct in no way impermissibly infringes them.

416 U.S. at 643 (footnote omitted).[8]

In the omitted footnote, the Donnelly Court found no factual basis for the claim that the prosecutor's statements "may have deprived him of the right to confrontation." 416 U.S. at 643, n. 5 (citing Pointer v. Texas, 380 U.S. 400 (1965)). Here, by contrast, the prosecutor's questions and argument directly attacked Jones for exercising his specific constitutional right to "confront" his accuser. The introduction of testimony from CPS worker Mitchell, "that she believed Jones had molested A.," similarly violated the specific Sixth

---

[8] Accord: Romano v. Oklahoma, 512 U.S. 1, 12 (1994) (noting that Donnelly did not involve a situation where the "State denied the benefit of a specific [constitutional] right").

Amendment right to have the jury decide guilt or innocence.

This Court should grant certiorari, not only to correct the egregious constitutional violations discussed above, but also to clarify the appropriate standard for evaluating habeas claims involving "a specific provision of the Bill of Rights" within the meaning of Donnelly. Some courts have applied Donnelly as the district court did here. See, e.g., Thompson v. Borg, 74 F.3d 1571, 1576 (9th Cir.), cert. denied, 117 S.Ct. 227 (1996). Accord: Williams v. Kemp, 846 F.2d 1276, 1283 (11th Cir. 1988), cert. dismissed, 489 U.S. 1094 (1989), cert. denied, 494 U.S. 1013 (1990); Davis v. Wyrick, 766 F.2d 1197, 1203 (9th Cir. 1985), cert. denied, 475 U.S. 1020 (1986); Brooks v. Kemp, 762 F.2d 1383, 1400 (11th Cir. 1985), vac't & remanded on other grounds, 478 U.S. 1016 (1986).

However, many other courts have recognized the Donnelly corollary, that "when the impropriety complained of effectively deprived the defendant of a specific constitutional right a habeas claim may be established without requiring proof that the entire trial was thereby rendered fundamentally unfair." Mahorney v. Wallman, 917 F.2d 469, 472 (10th Cir. 1990). See also, Rogers v. Lynaugh, 848 F.2d 606, 608-612 (5th Cir. 1988); Miller v. Lockhart, 65 F.3d 676, 684 (8th Cir. 1995) (noting that Donnelly requires court to take "special care" to assure that prosecutorial conduct in no way infringes on specific guarantee of the Bill of Rights); Ward v. Whitley, 21 F.3d 1355, 1364 (5th Cir. 1994) (due process standard not applicable where improper prosecutorial argument implicates a specific constitutional provision), cert. denied, 115 S.Ct. 1257 (1995). Accord

United States v. Cotnam, 88 F.3d 487, 497-98, cert. denied, 117 S.Ct. 326 (1996).

V. AS A MATTER OF LAW, THESE NUMEROUS, CONSTITUTIONAL ERRORS CANNOT BE DEEMED HARMLESS

In Brecht v. Abrahamson, 507 U.S. 619 (1993), this Court held that the correct harmless error standard in most habeas corpus cases is "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" Id. at 637 (quoting from and adopting the standard set forth in Kotteakos v. United States, 328 U.S. 750, 776 (1946)). And in O'Neal v. McAninch, 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995), this Court made clear that "[c]onstitutional error . . . casts on someone other than the person prejudiced by it a burden to show that it was harmless." Id. at 995.

Each of the errors in this case was of "such a character that [their] natural

effect is to prejudice a litigant's substantial rights." Id. at 996 (quoting Kotteakos, 328 U.S. at 760). The cumulative effect of so many serious errors is compelling. See O'Neal, 115 S.Ct. at 996. As noted by this Court in United States v. Hasting, 461 U.S. 499, 500 (1983):

> [I]t is not the appellate court's function to determine guilt or innocence. . . . Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. . . . [T]he question is, not were [the jury] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

Id. at 516 (quoting Kotteakos v. United States, 328 U.S. at 763-64).

CONCLUSION

While it is true that "[c]ases involving sexual abuse exert an almost irresistible pressure on the emotions of the bench and bar alike," it is also fundamental that "a strict adherence to the rules of evidence and appropriate prosecutorial conduct is required to ensure a fair trial." Martin v. Parker, 11 F.3d 613, 616, 617 (6th Cir. 1993). This Court recognized in Berger v. United States, 295 U.S. 78 (1934), that a prosecutor

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as

> much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a proper one.

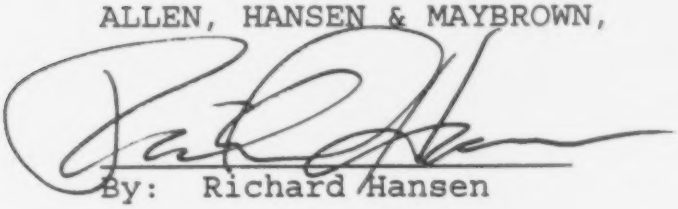
Id. at 88.

The prosecutor in this case ignored the Berger Court's admonition by employing "foul blows" that eviscerated several fundamental provisions of the Bill of Rights. This case presents such flagrant examples of Griffin error applied to confrontation rights, expert opinion that usurped the role of the jury, and unprecedented excesses of prosecutorial misconduct, that certiorari should be granted to resolve conflicting circuit decisions over the proper application of the Donnelly test to specific violations of the Bill of Rights.

DATED this 6th day of August, 1997.

Respectfully submitted,

ALLEN, HANSEN & MAYBROWN,



By: Richard Hansen

Counsel for Petitioner

ALLEN, HANSEN & MAYBROWN
1001 Fourth Avenue, #4301
Seattle, Washington 98154
(206) 447-9681

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD S. JONES, Appellant, v. KURT PETERSON, Superintendent, Respondent, and PHIL STANLEY, Superintendent, CHASE RIVELAND, Director, Department of Corrections, Respondents- Appellees.	)	No. 96-35370 D.C. No. CV-95- 00820-JLW MEMORANDUM*

Appeal from the United States
District Court
for the Western District
of Washington

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by the 9th Cir. R. 36-3.

John L. Weinberg, Magistrate Judge, Presiding

Submitted February 5, 1997**
Seattle, Washington

Before: BROWNING, RYMER, and T.G. NELSON, Circuit Judges

Our Circuit has not decided whether a magistrate judge has jurisdiction to issue a certificate of probable cause, and we do not decide that question now. We have held on several occasions that where an appeal presents a difficult jurisdictional question we may assume juris diction if the merits of the appeal are insubstantial. See, e.g., Clow v. U.S. Dep't of Housing & Urban Dev., 948 F.2d 614, 616-17 (9th Cir. 1991). We assume jurisdiction over this appeal on that basis.

** The panel finds this case appropriate for submission without oral argument pursuant to 9th Cir. R. 34-4 and Fed. R. App. P. 34(a).

The standard for determining whether habeas relief should be granted in a Section 2254 proceeding is whether the alleged errors "had a substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). The untainted evidence of guilt was overwhelming: Jones admitted to having touched the victim, and the testimony of the victim, an eyewitness, and a physician provided the details of the offenses charged. To the extent that constitutional errors occurred, they were not prejudicial and therefore did not rise to the level of requiring habeas relief.

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DONALD S. JONES, Petitioner,	)	CASE NO. C95-820W
v.	)	
PHIL STANLEY, et al., Respondents.	)	MEMORANDUM ORDER

Petitioner seeks habeas relief under 28 U.S.C. § 2254. He is currently incarcerated at the Washington Department of Corrections in Shelton, Washington. Respondents move for summary judgment. For the reasons discussed below, the court grants respondents' Motion For Summary Judgment, and denies the petition for writ of habeas corpus.

PROCEDURAL HISTORY

On March 5, 1991, petitioner was convicted by jury on one count of first

degree child molestation, pursuant to R.C.W. § 9A.44.083, and on one count of first degree rape of a child, pursuant to R.C.W. § 9A.44.073. (Docket 17, exh. 4.) On February 2, 1995, he was sentenced to concurrent terms of 24 months' and 58 months' imprisonment. (Id.)

Petitioner appealed his conviction to the Washington State Court of Appeals on five grounds. (See id., exh. 8.) On December 6, 1993, the Washington State Court of Appeals affirmed his conviction in a published opinion. See State v. Jones, 71 Wn. App. 798 (1993), review denied, 124 Wn. 2d 1018, 881 P.2d 254 (1994). (Docket 2, attachment.) On December 23, 1993, petitioner filed a motion for reconsideration with the Washington State Court of Appeals. (Docket 17, exh. 11.) That motion was denied on February 28, 1994. (Id., exh. 12.)

Petitioner then filed a motion for discretionary review in the Washington State Supreme Court. (See id., exh. 13.) He presented eight grounds for relief. (Id.) On September 7, 1994, the Washington State Supreme Court denied the petition for review. (Id., exh. 14.) On October 13, 1994, the Washington State Court of Appeals issued a mandate terminating review. (Id., exh. 15.)

Petitioner filed this habeas petition on May 26, 1995. (Docket 1.) Respondents moved for summary judgment on November 16, 1995. (Docket 17.)

SUMMARY JUDGMENT STANDARD

Summary judgment under Federal Rules of Civil Procedure 56(c) may be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In deciding the motion the court

views the evidence in the light most favorable to the non-moving party. Anderson, 477 U.S. at 255. However, the non-moving party must respond to an adequately supported motion by showing that a genuine issue of material fact exists; if the response falls short of that, summary judgment should be granted. Fed. R. Civ. P. 56(e); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987).

In this case, petitioner concedes that there are no genuine issues of material fact in dispute and, thus, requests that the court address the merits of his claims. (Docket 22 at 2.)

GROUNDS FOR RELIEF

Petitioner presents the following grounds for habeas relief:

1. Violation of petitioner's confrontation rights;

2. Prosecutorial misconduct;

3. Lack of jury unanimity;

4. Improper opinion testimony that invaded the province of the jury; and

5. Improper exclusion of defense testimony.

(Docket 2.)

DISCUSSION

Exhaustion of State Court Remedies

State remedies must first be exhausted on all issues raised in a federal habeas corpus petition. Rose v. Lundy, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b), (c). Exhaustion must be shown either by providing the highest state court with the opportunity to rule on the merits of the claim or by showing that no state remedy remains available. Batchelor v. Cupp, 693 F.2d 859 (9th Cir. 1982), cert. denied, 463 U.S. 1212 (1983).

The exhaustion requirement is a matter of comity, intended to afford the state courts "the first opportunity to remedy a

constitutional violation." Sweet v. Cupp, 640 F.2d 233, 236 (9th Cir. 1981). Therefore, a federal habeas petitioner must "provide the state courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing on his constitutional claim." Anderson v. Harless, 459 U.S. 4, 6 (1982) (quoting Picard v. Connor, 404 U.S. 270, 276-77 (1971)). "It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state law claim was made." Id. The habeas petitioner must have "'fairly presented' to the state courts the 'substance' of his federal habeas corpus claim." Id.; Picard, 404 U.S. at 275; see also Marino v. Vasquez, 812 F.2d 499 (9th Cir. 1987). State courts "must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution."

Duncan v. Henry, 513 U.S. ____, 115 S.Ct. 887, 888, reh'g denied, 115 S.Ct. 1394 (1995). Thus, a petitioner must expressly raise the United States Constitutional violation in both state and federal court. Id.

In this case, respondents concede that petitioner fairly presented his first claim to the Washington State Supreme Court and that he has therefore exhausted his state remedies under 28 U.S.C. § 2254(b). However, respondents allege that petitioner failed to fairly present the remaining four claims to the state's highest court because the claims were not presented as constitution violations. (Docket 18.) Nevertheless, respondents contend that petitioner has technically exhausted his state court remedies, as his claims are time-barred in state court under an independent and adequate state procedural bar. But, respondents argue

petitioner has demonstrated neither cause and prejudice for the defaults, nor that he is factually innocent. (Docket 18 at 9.)

Petitioner alleges that his claims were presented to the state's highest court as federal constitutional violations. (Docket 22 at 4.) Moreover, he argues that Ninth Circuit case law supports a less restrictive reading of what is required to "fairly present" a claim than that espoused by respondents. (Id. at 3-4.) Petitioner also contends his claims are not procedurally barred.

Under Duncan, the state courts must "surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution." Duncan, 115 S.Ct. at 888. In this case, only petitioner's first claim for relief clearly raised a constitutional claim. Jones, 71 Wn. App. at 809-11. However, the state

court of appeals must have been alerted to the fact that petitioner's third claim was intended to raise constitutional issues, as the court considered the claims under the United States Constitution. Id. at 821. The remaining three claims (2, 4, and 5) were not presented as constitutional issues, and the analysis by the state court was confined to state law. Id. at 806-824.

Petitioner also contends that Ninth Circuit case law supports a less restrictive reading of what is required to "fairly present" a claim than that espoused by respondents, and presumably that set forth in Duncan. (Docket 22 at 3-4.) However, the Ninth Circuit cases upon which petitioner relies were all decided prior to Duncan, with the exception of Crotts v. Smith, 73 F.3d 861 (9th Cir. 1996), in which the petitioner clearly asserted a constitutional violation in his state

habeas proceedings. Id. at 864. Even under a less restrictive analysis, petitioner's second, fourth and fifth claims were not fairly presented as constitutional claims to the state courts. See Picard, 404 U.S. at 275.

Finally, respondents allege that petitioner's claims are procedurally barred from review by the state courts, under R.C.W. § 10.73.090, which bars collateral attacks which are brought one year after the conviction becomes final. Petitioner, however, claims he is not procedurally barred in this court and, therefore, should be permitted to proceed on the merits. (Docket 22 at 7-9.) In order to determine whether petitioner is procedurally barred in this court, it is necessary to examine the dates at issue. First, petitioner's judgment became final on October 13, 1994, when the court of appeals issued its mandate. (Docket 17,

exh. 15.) Petitioner then filed this habeas corpus petition on May 26, 1995. (Docket 1.) Service upon all defendants was not accomplished, however, until October 11, 1995. When respondents filed their motion for summary judgment, on November 16, 1995, the one year time-bar, under R.C.W. § 10.73.090, was in place.

Ninth Circuit case law states that:

> [t]he appropriate time to assess whether a prisoner has exhausted his state remedies is when the federal habeas petition is filed, not when it comes on for a hearing in the district court or court of appeals.

Brown v. Maass, 11 F.3d 914, 915 (9th Cir. 1993). When petitioner filed his habeas petition, he had not yet exhausted his state court remedies, nor was he in procedural default. However, petitioner's return to state court at this point may be futile. And, a petitioner is not required to pursue state court remedies where to do

so appears futile. Matias v. Oshiro, 683 F.2d 318, 320 (9th Cir. 1982); Russell v. Rolfs, 893 F.2d 1033 (9th Cir. 1990), cert. denied, 501 U.S. 1260 (1991).

Thus, in the interest of comity and judicial efficiency the court will address the merits of the habeas petition without requiring petitioner to initiate additional state proceedings. See Granberry v. Greer, 481 U.S. 129, 134-136 (1987).

Claim #1

During the trial the prosecutor apparently blocked petitioner's view of the victim ("A.") while she examined A. During a recess, defense counsel notified the court that petitioner was unable to see the witness as she testified. The court found the obstruction inadvertent and advised petitioner to relocate himself if he could not see the witness.

In this case, petitioner is not objecting to the fact that the prosecutor

blocked his view of the witness. He claims the prosecutor's questions during cross-examination of petitioner, and comments during closing argument, lead the jury to draw negative inferences from the exercise of his constitutional right to confront an adverse witness. This claim, however, does not directly implicate petitioner's Sixth Amendment right. Instead, petitioner appears to challenge the prosecutor's conduct and the effect it had on his Sixth Amendment rights.

Respondents contend the prosecutor's actions were not constitutionally improper and did not result in a denial of due process.

When a prosecutor's conduct is placed in question, the standard of review is the "narrow one of due process, and not the broad exercise of supervisory power." Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974). Although the prosecutor's

argument may be egregious and improper, this court cannot issue a writ of habeas corpus to state authorities unless the prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly, 416 U.S. at 643; Thompson v. Borg, No. 94-15846, 1996 WL 26782, at *5 (9th Cir. Jan 22, 1996) (to be reported at 74 F.3d 1571); Darden v. Wainwright, 477 U.S. 168, 181 (1986). "Improper argument does not, per se, violate a defendant's constitutional rights." Jeffries v. Blodgett, 5 F.3d 1180, 1191 (9th Cir. 1993), cert. denied, 114 S.Ct. 1294 (1994); Duckett v. Godinez, 67 F.3d 734, 743 (9th Cir. 1995).

First, petitioner challenges the constitutionality of the following question:

> And yet weren't you frustrated because I was blocking your view from her such that you could not stare at her as she was testifying here; isn't that right? Is that right?

(Docket 17, exh. 3 at 366.) The prosecutor's question, which was asked and answered during cross examination of petitioner, did not illicit an objection from defense counsel. (Id.) Moreover, petitioner answered the question affirmatively. (Id.)

While the prosecutor's line of questioning may have been improper, the federal court cannot issue a writ of habeas corpus unless the impropriety was constitutional error. See Thompson, No. 94-15846, 1996 WL 26782, at *5. Here, petitioner fails to show that the prosecutor's question "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly, 416 U.S. at 643. Moreover, in the context of the entire trial, there is nothing to indicate that the question affected the jury's ability to judge the evidence fairly. United States v. McKoy,

771 F.2d 1207, 1212 (9th Cir. 1985) (citing United States v. Young, 470 U.S. 1, 11-12 (1985)). Therefore, petitioner was not denied the right to a fair trial, nor the right to confront his accuser when the prosecutor cross-examined him.

Petitioner also claims the prosecutor's comments during closing argument violated his right to confront a witness testifying against him. Again, petitioner seems to challenge the prosecutor's conduct, rather than his right to confront the victim. Specifically, petitioner challenges the prosecutor's reference to his "frustrated" view of A., and her implication that petitioner's desire to have direct eye contact with A. was unreasonable considering he had also testified that he loved A. Jones, 71 Wn. App. at 806.

Again, petitioner has failed to demonstrate how these comments, taken together or separately, "so infected the trial with

unfairness as to make the resulting conviction a denial of due process." Donnelly, 416 U.S. at 643.

Accordingly, the court finds no due process violation arose from the prosecutor's comments during cross-examination of petitioner or during her closing arguments.

Claim #2

Petitioner claims numerous comments in the prosecutor's closing argument violated his due process rights. He challenges the prosecutor's appeal to the passion and prejudice of the jury, her reference to the victim's fear of returning to the court room, and her reference to other incidents of touching. Respondents contend the prosecutor's comments do not amount to constitutional error.

First, petitioner claims the prosecutor appealed to the passion and prejudice of the jury when she stated:

> We as a society talk, we proclaim, we articulate, we are concerned about our children, and many people sing songs about our children. Whitney Houston talks about how they will inherit the earth. And yet we still have a system that requires that child to have to walk in through those two big doors as a very, very small person and walk up here in front of twelve people, twelve grownups whom they don't know, and sit in this chair in a courtroom such as this, with the defendant sitting right there, staring at them.

Jones, 71 Wn. App. at 805-06.

Respondents assert that the prosecutor's comments were "merely intended to address the difficulty a child may experience in testifying, and were thus merely a comment on the credibility of A." (Docket 18 at 16.)

Prosecutors "are allowed reasonably wide latitude and are free to argue reasonable inferences from the evidence," in their closing arguments. United States v. Enrique-Estrada, 999 F.2d 1355, 1361 (9th Cir. 1993). Counsel is then free to

object if she or he believes the statements are improper. In this case, defense counsel did not object to the prosecutor's statements, nor did he request a curative instruction.

The trial court, however, specifically instructed the jury, after closing arguments, that remarks, statements and arguments made by the attorneys are not evidence and that they should not permit sympathy or prejudice to influence their verdict. (Docket 17, exh. 5 at 80-81.) In addition, the prosecutor reminded the jury in her rebuttal argument that counsel's arguments should not be considered as evidence. (Id., exh. 3 at 407.)

Jury instructions, such as this "dilute the potential prejudice arising from improper statements." United States v. Koon, 34 F.3d 1416, 1445 (9th Cir. 1994), cert. granted in part, 116 S.Ct. 39 (1995). The Ninth Circuit has also held

that "such instructions are sufficient to cure prejudice resulting from improper prosecutorial argument." United State v. Mares, 940 F.2d 455, 461 (9th Cir. 1991) (citing United State v. Fleishman, 684 F.2d 1329, 1344 (9th Cir.) cert. denied, 459 U.S. 1044 (1982); see also Duckett, 67 F.3d at 746.

In addition to examining the content of curative instructions, the court must also examine the closeness of the case. United States v. Kerr, 981 F.2d 1050, 1054 (9th Cir. 1992) (quoting United States v. Sanchez, 944 F.2d 497, 499 (9th Cir. 1991). Here, the weight of the evidence against petitioner supports a finding of guilt. There was "an eyewitness account of the incident and Jones' own admission that he touched A." Jones, 71 Wn. App. at 812. (See docket 17, exh. 3 at 351, 360.) The weight of the evidence reduces the likelihood that the jury was affected by

the prosecutor's comments. See Darden, 477 U.S. at 182.

Considering the wide latitude afforded prosecutors, the jury instructions that were given, and the weight of the evidence, it is clear that the prosecutor's comments did not "so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly, 416 U.S. at 643; see Greer v. Miller, 483 U.S. 756, 766 (1987). Furthermore, there is no evidence that the comments affected the jury's ability to judge the evidence fairly. McKoy, 771 F.2d at 1212. Accordingly, the court finds these comments did not violated petitioner's due process rights.

Petitioner also claims his due process rights were violated when the prosecutor stated that A. was too frightened of petitioner to return to the court room after she testified. (See docket 17, exh.

3 at 388.) Respondents only briefly mention this issue. (Docket 18 at 12.) It should be noted, petitioner did not present this claim of prosecutorial misconduct to the state court of appeals or the state supreme court. (See docket 17, exh. 8 at 23-30 and exh. 13 at 7-9.) Neither party addresses the issue of exhaustion as to this claim. Nevertheless, in the interest of comity and judicial efficiency, the court will consider this issue on the merits. See Granberry, 481 U.S. at 134-136.

First, the reviewing court may not presume, as petitioner suggests, that a prosecutor intended such statements to "have its most damaging meaning." Donnelly, 416 U.S. at 647. Second, even if the prosecutor's comments were improper, the federal court cannot issue a writ of habeas corpus unless the impropriety

was constitutional error. See Thompson, No. 94-15846, 1996 WL 26782, at *5.

In this case, petitioner fails to show that the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly, 416 U.S. at 643. And, in the context of the entire trial, there is nothing to indicate that the question affected the jury's ability to judge the evidence fairly. McKoy, 771 F.2d at 1212. Thus, petitioner was not denied the right to a fair trial when the prosecutor commented on A.'s frightened state.

Finally, petitioner claims that his constitutional right to due process was violated when the prosecutor referred to other incidents of touching by petitioner in her closing argument.

Respondents claim that the incidents to which the prosecutor's comments related

"had been discussed at trial and were properly in evidence." (Docket 18 at 16.) See Jones, 71 Wn. App. at 809. In addition, respondents contend that the prosecutor was "rebutting the defense's chronology of the case and explaining why A. was sexually acting out prior to the charged incident." (Docket 18 at 16-17.)

As stated previously, prosecutors are granted wide latitude and may make reasonable inferences from the evidence. Enrique-Estrada, 999 F.2d at 1361. Here, the prosecutor stated in her rebuttal that "we know that this is not the only time, we know she said it happened a number of times." (Docket 17, exh. 3 at 408.) It is clear, from the context of the argument, that the prosecutor was attempting to disprove defense counsel's chronology of events. (See id.) Furthermore, several witnesses had testified that other incidents of touching had occurred. Thus,

the prosecutor's statements were reasonable in light of the evidence.

Petitioner has failed to show that the prosecutor's comments regarding other incidents of touching "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly, 416 U.S. at 643. In addition, there is no evidence that the comments affected the jury's ability to judge the evidence fairly. See McKoy, 771 F.2d at 1212. Accordingly, the court finds these comments did not violate petitioner's due process rights.

Claims #3

Petitioner claims that his constitutional rights, presumably under the Sixth Amendment, were violated by the trial court's failure to instruct the jurors that they must be unanimous as to the crime charged in the indictment. He contends that several witnesses testified

that there were multiple incidents of "bad touching" by petitioner and, thus, the jury should have been advised that only one incident was at issue. (Docket 2 at 16.)

Respondents claim that petitioner fails to state a federal ground for relief. In the alternative, respondents contend that there is no reasonable possibility that the jury was not unanimous as to which incident was at issue.

The Sixth Amendment provides a federal criminal defendant (as contrasted to a state defendant) the right to a unanimous jury verdict. Apodaca v. Oregon, 406 U.S. 404 (1972). "But it is the Fourteenth Amendment, rather than the Sixth, that imposes upon the States the requirement that they provide jury trials to those accused of serious crimes." Johnson v. Louisiana, 406 U.S. 356, 371 (1972) (Powell, J., concurring). States have the

right to decide for themselves ". . . whether the verdict must be unanimous or not." Id. at 372. Thus, the United States Constitution does not guarantee a unanimous verdict in a state criminal trial. See Schad v. Arizona, 501 U.S. 624, 635 fn. 5 (1991). Furthermore, the Court stated that it is a long-established rule that a jury need not agree on which overt act, among several, was the means by which a crime was committed. Id.

"In Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed." State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). "When the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a

specific criminal act." Id. (citing State v. Petrich, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984)).

As previously stated, it is not the province of federal habeas courts to reexamine state court conclusions regarding matters of state law. Estelle, 502 U.S. at 68; Jeffries, 5 F.3d at 1192. A federal habeas court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. Estelle, 502 U.S. at 68 (citing 28 U.S.C. § 2241).

Here, the state courts considered petitioner's claim that his right to a unanimous verdict was violated by the trial court's failure to instruct the jurors that they must be unanimous as to which alleged incident caused the crime or crimes charged. Jones, 71 Wn. App. at 821-23. (Docket 17, exh. 14.) The Washington Court of Appeals held, and the

Washington State Supreme Court affirmed, that the Petrich rule applies where multiple acts are alleged. Jones, 71 Wn. App. at 823 n.12. In this case, the State did not allege multiple acts. Id. The court concluded, therefore, that no unanimity instruction was required as to which specific incident of "bad touching" caused the harm. "[T]he evidence was simply not sufficiently substantial to raise this matter to a multiple acts case." Jones 71 Wn. App. at 823.

The Washington Supreme Court's interpretation of Washington state law is not subject to federal habeas review. The United States Constitution does not require a unanimous verdict in a state court criminal trial. Therefore, the court grants respondents' Motion For Summary Judgment as to petitioner's unanimity claim.

Claims #4

Petitioner's fourth claim alleges that improper opinion testimony by Child Protective Service caseworker Judy Mitchell invaded the province of the jury. (Docket 2 at 18.) Petitioner cites several instances of "constitutional magnitude," in an attempt to present his claim as a constitutional violation.

Respondents claim petitioner is challenging state evidentiary standards and, thus, fails to state a ground for habeas relief. In the alternative, if petitioner's claim is construed as a due process violation, respondents contend the alleged instances of improper opinion testimony did not render petitioner's trial fundamentally unfair.

First, it is unclear whether petitioner is asserting a constitutional violation. At the state level, petitioner claimed the trial judge erred in admitting, over

objection, the testimony of a CPS case-worker. (Docket 17, exh. 8 at 30.) In his habeas petition, petitioner presents the same claim, but alleges that "[t]he constitution precludes a witness from giving 'a direct opinion on the defendant's guilt or innocence.'" (Docket 22 at 15.) In support of this contention, petitioner relies heavily on United States v. Kinsey, 843 F.2d 383, 388 (9th Cir.), cert. denied, 487 U.S. 1223, reh'g denied, 488 U.S. 880 (1988).

Kinsey, however, does not state that the Constitution precludes an expert witness from giving a direct opinion as to the defendant's guilt or innocence. Id. Kinsey states that the Federal Rules of Evidence preclude such testimony. Id. The Federal Rules of Evidence, however, do not provide petitioner constitutional protection. More importantly, the Federal Rules of Evidence do not apply to state

court proceedings. Because petitioner's claim arose in state court, state evidentiary rules apply.

Whether a state trial court properly applied its own rules of evidence is not a matter cognizable on federal habeas corpus. Estelle, 502 U.S. at 68; Jeffries, 5 F.3d at 1192; Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991). "[A] federal habeas court may not prescribe evidentiary rules for the states." Swan v. Peterson, 6 F.3d 1373, 1382 (9th Cir. 1993), cert. denied, 115 S.Ct. 479 (1994). And, it is not the province of federal habeas courts to reexamine state court conclusions regarding matters of state law. Estelle, 502 U.S. at 68.

In this case, the state courts found, after careful examination of the Washington Rules of Evidence and the opinion testimony of Ms. Mitchell, that the alleged evidentiary errors were either

harmless or were not properly preserved for appeal. Jones, 71 Wn. App. at 812-20.

Because a federal habeas court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States, and petitioner failed to raise a claim under the United States Constitution, he has failed to state a ground for habeas relief. Accordingly, the court grants respondents' Motion For Summary Judgment as to this claim.

Claim #5

Petitioner's fifth claim alleges that the state trial court erred by improperly excluding petitioner's testimony. Petitioner attempted to introduce testimony of his awareness "of A.'s sexual contact with others and his allegedly innocent intent to understand and correct her during the bedroom incident." Jones, 71 Wn. App. at 823.

Respondents claim that the excluded evidence was cumulative of other testimony and, thus, did not deprive petitioner of his opportunity to present a defense or his right to a fair trial.

Petitioner's claim alleges a constitutional violation under the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. See Rock v. Arkansas, 483 U.S. 44, 52 (1987); see also Washington v. Texas, 388 U.S. 14, 17-19 (1967). The Compulsory Process Clause of the Sixth Amendment guarantees a defendant the right to present testimony which is both "material and favorable to his defense." United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982). The Fourteenth Amendment guarantees a defendant the right to a fair trial.

In order to determine whether exclusion of evidence violates the Due Process

Clause or the Sixth Amendment, the Ninth Circuit uses the following five-part balancing test:

> (1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense.

Tinsley v. Borg, 895 F.2d 520, 530 (9th Cir. 1990), cert. denied, 498 U.S. 1091 (1991); Perry v. Rushen, 713 F.2d 1447, 1452-53 (9th Cir. 1983), cert. denied, 469 U.S. 838 (1984); United States v. Duran, 41 F.3d 540, 545 (9th Cir. 1994). Then, the court must "balance the importance of the evidence against the state interest in exclusion." Perry, 713 F.2d at 1452.

At trial, petitioner's testimony was excluded as hearsay. Jones, 71 Wn. App. at 823-824. On appeal the state court of appeals found that the testimony should

not have been excluded on that basis. Id. The court found that the testimony was offered to prove petitioner's intent, not to prove the truth of the matter asserted. Id. Instead of reversing the trial court, however, the court of appeals found that the testimony could have been excluded under Washington Rule of Evidence 403, which permits exclusion of evidence if its probative value is substantially outweighed by its prejudicial effect. Id.

First, the probative value of the proffered testimony on the central issues at trial is questionable. The petitioner's mental state is not an element of the crime of rape of a child in the first degree. See R.C.W. § 9A.44.073. And, while petitioner's intent may have been relevant as to the charge of child molestation in the first degree, several witnesses were permitted to testify that they had seen A. acting out sexually.

(Docket 17, exh. 3 at 304-318.) Hence, petitioner's testimony was not the sole evidence on the issue and would have been cumulative. Furthermore, petitioner was permitted to testify as to his own awareness of A.'s acting out. (Id., exh. 3 at 340-41.)

Thus, after considering the importance of the evidence and the state's interest in its exclusion, it is apparent that petitioner was not prevented from presenting his defense or denied the right to a fair trial. Accordingly, the court finds the state court's exclusion of petitioner's proffered testimony did not violate his constitutional rights.

It is hereby ORDERED that respondents' Motion For Summary Judgment is GRANTED and the petition is DISMISSED with prejudice.

DATED this 7 day of March, 1996.

John L. Weinberg
United States Magistrate Judge

STATE OF WASHINGTON, RESPONDENT,
V.
DONALD STEVE JONES, APPELLANT.

No. 28925-0-I.
Court of Appeals of Washington,
Division 1.

Dec. 6, 1993.

Defendant was convicted in the Superior Court, King County, Jim Bates, J., of first-degree child molestation and first-degree rape of child, and he appealed. The Court of Appeals, Grosse, J., held that: (1) allegedly prejudicial remarks made by prosecutor during closing arguments did not constitute reversible error; (2) admission of testimony of child protective services caseworker was proper; (3) lack of unanimity instruction did not constitute prejudicial error requiring reversal; and (4) child molestation did not merge as lesser included offense of first-degree rape of child.

Affirmed.

David Allen, Richard Hansen, Todd Maybrown, Allen & Hansen, Seattle, for appellant.

Norm Maleng, Pros. Atty., Michael Lang, King County Deputy Prosecutor, Seattle, for respondent.

GROSSE, Judge.

The appellant, Donald S. Jones, appeals his convictions on one count of first degree child molestation and one count of first degree rape of a child.

The charges in this case stem from an incident alleged to have occurred between September 1, 1989 and January 31, 1990. Jones was living with his girl friend,

Lorayne Hanson, and her children from a previous marriage. According to the testimony of Hanson and Jones, Hanson's 7-year-old daughter, A., was occasionally observed acting out sexually. One evening, Jones and Hanson went out to dinner and had several drinks. After they returned from dinner, Jones undressed and got into bed. Hanson was out of the room putting the children to bed. Hanson testified that she walked into the bedroom and found Jones unclothed, lying on the bed next to A., whose nightgown was pulled up to her chest. A. was not wearing underwear. Jones had his hand on A.'s stomach and was sexually aroused. Hanson testified that Jones explained to Hanson that he was trying to discuss sex with A.

Jones testified that A. had climbed into bed with him, and they started discussing her recent sexual acting out. Jones alleged that A. reached out and touched him. Jones also testified that during the course of their discussion he did momentarily touch her vaginal area, but stated his touching her was not caused by any sexual motivation and he was not sexually aroused.

Hanson testified that she spoke with A. about the incident the next morning. A. told her Jones put his tongue in her mouth and rubbed her vaginal area. Eventually a school counselor, Bruce Vatne, contacted Child Protective Services (CPS) after A. told him Jones had touched her vaginal area and kissed her. A CPS caseworker, Judy Mitchell, interviewed A. During the interview, A. reiterated a claim that Jones had put a finger inside her vagina and that it hurt. Mitchell placed A. in protective custody. A. was examined by Dr. Rebecca Wiester on February 20, 1990. Dr. Wiester concluded that the findings from the physical were consistent with vaginal penetration. Dr. Wiester testified that A. told her Jones had touched her vaginal area

while they were on the bed.

Dependency proceedings were filed. Mitchell testified she read the allegations from the dependency petition to Jones, who did not deny that he had touched A. and further admitted that he had asked her to perform oral sex on him.

Jones was charged with one count of first degree child molestation and one count of first degree rape of a child. Prior to trial, A. was found competent to testify. The trial court ruled her statements to Dr. Wiester; Bruce Vatne, the school counselor; Judy Mitchell, the CPS caseworker; and to her mother were admissible. The court also allowed Mitchell to testify as to Jones' statements to her.

The prosecution called Mitchell as a witness for the State. Mitchell testified to her background, which included a masters of social work from the University of Washington. Mitchell had been working as a professional social worker since 1976. She estimated she had worked with approximately 300 to 400 children in her present occupation. Mitchell testified to A.'s hearsay statements and also testified that it was her impression that A. "thought it was all her fault." Mitchell testified that she pointed out to A. that it was not her fault and stated that this phenomenon was not uncommon among the sexually abused children she sees.

Mitchell then testified, "[S]he [A.] said to me 'Believe me, believe me, I am telling you that this happened,' and I said 'I believe you.' " The following exchange then occurred between the prosecutor and Mitchell:

Q: Judy, based again on the hundreds of kids that you have seen, what was your assessment of [A.]?

[DEFENSE COUNSEL]: Objection, calls for an opinion.

THE COURT: Overruled.

Q: Go ahead and answer the question.

A: My assessment is that this child had some legitimate fears, based on some touching of her by Donnie. I felt that this child had been sexually molested by Donnie at that point.

On cross examination, Mitchell was questioned about A.'s sexual acting out. Mitchell testified A. had also related instances of victimization by others. On redirect, Mitchell was questioned about the acting out of sexual behaviors in abused children:

Q: [By the prosecutor] Based on your interaction with other children, children that you have found and have known to be sexually abused, is it uncommon to see them sexually acting-out?

[DEFENSE COUNSEL]: Objection. Same objection, your Honor, lack of foundation for an expert opinion.

THE COURT: Overruled.

A: It's very common for children who have been sexually abused to exhibit sexualized behaviors and to be revictimized by other parties.

Q: Based on your experience and all of the interviews that you have had with children, is it uncommon for those children to talk about having nightmares and dreams?

[DEFENSE COUNSEL]: Same objection, your Honor.

THE COURT: Overruled.

A: It is not uncommon, and we refer to this as night terrors.

Mitchell also stated A. told her of other instances of contact with Jones had occurred, testifying that A. told her "there was another bad touch, she said another bad touch two times". Bruce Vatne, the school counselor, also testified that A. had related other instances of contact: "I asked her then is this the one time that this had happened and did this happen just the one time, and she said no, it happened lots of times."[1]

A. testified at trial that Jones had put his tongue in her mouth and touched her vagina and that it hurt. During her testimony, Jones' view of A. was blocked by the position of the prosecutor questioning A. The defendant did not object during examination, but during recess brought to the court's attention the fact that he could not see A. The court found that the prosecutor's blocking was inadvertent and told Jones that he could position himself in a different spot where he could see the witness.

Subsequently, on cross examination of Jones, the following exchange took place:

BY [PROSECUTOR]:

Q: Mr. Jones, you felt hurt and you were concerned when [A.] was testifying?

A: Yes, I did.

Q: And yet weren't you frustrated because I was blocking your view from her

---

[1] Jones mistakenly ascribes this statement to Dr. Wiester. Brief of Appellant, at 40.

such that you could not stare at her as she was testifying here; isn't that right? Is that right?

A: Yes, I did.

No objection was made to this colloquy. During direct examination, Jones was questioned about his knowledge of other allegations of sexual abuse against A. The prosecution's hearsay objection was sustained, although defense counsel argued the other allegations were relevant to show Jones' state of mind. Jones admitted that he had briefly touched A.'s vaginal area during the bedroom incident, but denied that he touched her for sexual gratification.

Proceeding with closing argument, the prosecutor stated:

> We as a society talk, we proclaim, we articulate, we are concerned about our children, and many people sing songs about our children. Whitney Houston talks about how they will inherit the earth. And yet we still have a system that requires that child to have to walk in through those two big doors as a very, very small person and walk up here in front of twelve people, twelve grownups whom they don't know, and sit in this chair in a courtroom such as this, with the defendant sitting right there, staring at them.
>
> . . . . .
>
> And just briefly, one more thing, because, quite frankly, you folks heard his testimony, you are reasonable people, you bring in your life experience and your common sense, and was that story reasonable? Absolutely not. "I love [A.], I care about [A.]," but at the same time he wants to have direct eye contact with her. Why? And what was the sult

> of that direct eye contact that first day? She broke down and she cried and she told you she was afraid. She was afraid of who? Of Donnie. And the CPS worker told you that outside how upset and how disturbed and how frightened she was so that she refused to walk through those two big doors again.

No objection was made to either statement. During the prosecutor's rebuttal argument, she stated:

> [T]he State has to be very, very careful which charges it brings because it has to be able to prove to you the specifics of, the specific parts of this crime, and to be told that it's only happened a number of times but not to be able to draw on the specifics, a charge may not be brought for all those other times, but we know this is not the only time, we know she said it happened a number of times, and we know he has had access to her since she was a child.

Again, no objection was made.

Jones submitted proposed jury instructions, but did not include a "Petrich instruction" appropriate when multiple instances of conduct are at issue. The jury found Jones guilty of one count of child molestation in the first degree and one count of rape of a child in the first degree. The defense moved for a new trial, alleging prosecutorial misconduct on the basis of the prosecutor's closing argument (Whitney Houston speech) and her references to multiple instances of Jones' abuse. The defense also alleged error in the court's admission of Mitchell's expert testimony on common traits of sexual abuse victims. The court denied the motion for a new trial. Jones appeals his convictions.

As an initial matter, Jones contends that

the prosecutor's "Whitney Houston" speech and her reference to multiple instances of abuse in closing argument constitute prosecutorial misconduct requiring reversal of his conviction. Appeals to the prejudice and passion of the jury and references to matters outside the evidence are improper. *State v. Belgarde*, 110 Wash.2d 504, 507, 755 P.2d 174 (1988). The defendant bears the burden of establishing that the remarks are improper and that there is a substantial likelihood the misconduct affected the verdict. *State v. Mak*, 105 Wash.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986). In general, when no objection to prosecutorial misconduct is made at trial, a reviewing court must ascertain whether any curative instruction could have remedied the improper remarks. The issue may be reviewed if it is "so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct." *State v. Belgarde*, 110 Wash.2d at 507, 755 P.2d 174. Here, no objection was made until Jones moved for a new trial after the verdict had been rendered.[2] The courts of

---

[2] Although Jones argues that his motion for a new trial sufficiently preserved these alleged errors for review, the cases cited by Jones do not support such a proposition in the context of prosecutorial misconduct. *State v. Ray*, 116 Wash.2d 531, 540, 806 P.2d 1220 (1991); *In re Lee*, 95 Wash.2d 357, 363, 623 P.2d 687 (1980); and *State v. Fagalde*, 85 Wash.2d 730, 731, 539 P.2d 86 (1975) state broadly that counsel may raise an error either during trial or in a motion for a nev trial to properly preserve it for review. In an instance of prosecutorial misconduct, however, the inquiry is whether a curative instruction could have rectified the comment and erased any prejudicial effect on the jury.

this state have consistently stated that any objection to prosecutorial misconduct is waived by failure to make a timely objection and request a curative instruction. *State v. Swan*, 114 Wash.2d 613, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991). As stated by the court in *Swan*:

> The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial ... in the context of the trial. Moreover, "[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal."
>
> (Footnotes omitted.) *Swan*, 114 Wash.2d at 661, 790 P.2d 610.

Accordingly, the inquiry is whether the comments were so flagrant and ill-intentioned that no instruction could neutralize their prejudice. In this case, the alleged misconduct included the prosecutor's reference to a general societal problem of concern for children and how the judicial system can be frightening to them. While this comment is improper to the extent it is designed to appeal to the passion and prejudice of the jury, it does not rise to the level of flagrancy requiring reversal. Jones correctly analogizes this comment to the comment disapproved of in *State v. Bautista-Caldera*, 56 Wash.App. 186, 195, 783 P.2d 116 (1989), *review denied*, 114 Wash.2d 1011, 790 P.2d 169 (1990), wherein the prosecutor asked the jury to " '[l]et her and children know that you're ready to believe them and [e]nforce the law on their behalf.' " This court found that such a comment, although improper, was not so

egregious as to require reversal. Similarly, any prejudicial effect of the "Whitney Houston" comment in this case could have been considerably lessened by a prompt curative instruction.

Jones also complains that in closing argument, the prosecutor improperly alluded to multiple instances of abuse beyond the one incident at issue at trial: "[W]e know this is not the only time, we know she said it happened a number of times". A prosecutor has wide latitude in closing argument to draw and express reasonable inferences from the evidence. *State v. Hoffman,* 116 Wash.2d 51, 95, 804 P.2d 577 (1991). However, a prosecutor may not make statements that are unsupported by the record and prejudice the defendant. *State v. Ray,* 116 Wash.2d 531, 550, 806 P.2d 1220 (1991); *State v. Claflin,* 38 Wash.App. 847, 851, 690 P.2d 1186 (1984), *review denied,* 103 Wash.2d 1014 (1985).

The State justifies its reference to other instances of Jones' misconduct on the basis that it was rebutting Jones' allegations that the bedroom incident occurred after A. had begun to sexually act out. The defense argued that the State's chronology was backwards because A.'s sexual acting out occurred prior to Jones' touching her. The State claimed it was entitled to rebut this chronology by posing an alternative explanation for A.'s sexual acting out prior to the incident at issue. Prosecutorial remarks that may otherwise be improper do not constitute grounds for reversal if they are made in reply to defense arguments, unless a curative instruction would not have cured them. *State v. Swan,* 114 Wash.2d at 663, 790 P.2d 610. Evidence of other instances of touching had been briefly discussed in the record in the testimony of Bruce Vatne, the school counselor, and Judy Mitchell, who related A.'s statements of other instances

of touching by Jones.

Jones argues that under *State v. Montague*, 31 Wash.App. 688, 691, 644 P.2d 715 (1982) and *State v. Torres*, 16 Wash.App. 254, 257, 554 P.2d 1069 (1976) reference to other acts was improper. However, *Montague* is distinguishable; the prosecutor in that case introduced evidence of another rape charge on cross examination of the defendant; no evidence had been presented on the issue and the defense counsel was unaware of the incident. *Torres* is also distinguishable because the prosecutor in his opening statement alluded to other crimes not charged in the information. In contrast here, the prosecutor in rebuttal mentioned incidents already discussed at trial, allegedly to refute the defense's theory of the case in closing argument. Even if the prosecutor's reference in rebuttal was improper, the prejudice accruing from it could have been alleviated with a prompt curative instruction.

Of greater concern is Jones' claim that his right of confrontation was compromised by the prosecutor's questions on cross examination and the remarks made in closing argument regarding his staring at A. during her testimony. Although Jones did not object to these comments at trial, issues of constitutional magnitude may be reviewed initially on appeal. *State v. Scott*, 110 Wash.2d 682, 688, 757 P.2d 492 (1988). In analyzing an alleged constitutional error raised initially on appeal, we must first determine whether the error raises a constitutional issue, then determine whether the error is manifest. If the error is manifest, we will address the merits of the issue. Finally, if error was committed, we will apply a harmless error analysis. *State v. Lynn*, 67 Wash.App. 339, 345, 835 P.2d 251 (1992).

The Sixth Amendment provides that an

accused has the right to confront adverse witnesses.[3] The scope of that right within the context of child abuse proceedings has been addressed by the United States Supreme Court. The Supreme Court held in *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988) that in a child sexual abuse case, an appellant's right to face-to-face confrontation was violated when the court allowed a screen to be placed between the testifying child victims and the accused. The court reasoned that face-to-face confrontation was essential to fairness. *Coy v. Iowa*, 487 U.S. at 1019, 108 S.Ct. at 2802. *See also State v. Wright*, 61 Wash.App. 819, 829, 810 P.2d 935 (recognizing that visual contact with witness stand is important under *Coy v. Iowa*), *review denied*, 117 Wash.2d 1012, 816 P.2d 1225 (1991).

Jones does not claim that his right of confrontation was directly violated, but alleges that prejudice resulted from the prosecutor's comments in cross examination and in closing argument regarding his eye contact with A. Jones claims the prosecutor's comments indicated to the jury that he should be penalized for exercising

---

[3] Amendment 6 to the U.S. Constitution provides in part:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... Jones argues article 1, section 22 of our State constitution provides broader protection than the federal confrontation clause. However, Jones has not provided this court with briefing of the factors set forth in *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986); therefore, we decline to consider the issue. *State v. Reding*, 119 Wash.2d 685, 696, 835 P.2d 1019 (1992).

his right of confrontation. In *State v. Rupe*, 101 Wash.2d 664, 683 P.2d 571 (1984), the Washington Supreme Court stated that the State may not act in a manner that would unnecessarily chill the exercise of a constitutional right, nor may the State draw unfavorable inferences from the exercise of a constitutional right. *Rupe*, 101 Wash.2d at 705, 683 P.2d 571 (citing *United States v. Jackson*, 390 U.S. 570, 581, 88 S.Ct. 1209, 1216, 20 L.Ed.2d 138 (1968)); *State v. Frampton*, 95 Wash.2d 469, 627 P.2d 922 (1981); *Griffin v. California*, 380 U.S. 609, 614, 85 S.Ct. 1229, 1232, 14 L.Ed.2d 106 (1965); *State v. Mace*, 97 Wash.2d 840, 650 P.2d 217 (1982)).

Although no Washington cases address the commentary of prosecutors on the exercise of the right to confrontation, the issue has been addressed by other jurisdictions. In *Dyson v. United States*, 418 A.2d 127, 131 (D.C.App.1980), the District of Columbia Court of Appeals concluded that prosecutorial comment on the defendant's right of confrontation constituted prosecutorial misconduct. In closing argument, the prosecutor commented on the presence of the defendant during the testimony of adverse witnesses and the delay of the defendant's own testimony until all other witnesses had taken the stand. The D.C. Court of Appeals found the prosecutor's improper comments substantially prejudiced the defendant and reversed the conviction. Similarly, in *Sherrod v. United States*, 478 A.2d 644, 654 (D.C.App.1984), the D.C. Court of Appeals extended *Dyson* to apply to cross examination. The court found a prosecutor's question about the defendant listening to the testimony of other witnesses to be improper.

We find the analysis of *Dyson* and *Sherrod* applicable to the instant case. The prosecutor commented on Jones' frustration when he could not see A. testifying, and in

closing argument alluded to the fact her courtroom contact with Jones was so traumatic that she could not return to court. The State argues that its cross examination of Jones was justified to rebut Jones' testimony about his love for A., relying on *State v. Graham*, 59 Wash.App. 418, 427, 798 P.2d 314 (1990), and *State v. Olson*, 30 Wash.App. 298, 300-01, 633 P.2d 927 (1981), which allow the scope of cross examination to include questioning to qualify or rebut direct testimony.

The State claims its questioning was designed to rebut Jones' asserted feelings toward A. However, as the D.C. Court of Appeals noted in *Sherrod*, consistent with *Rupe*, such questioning is impermissible when it invites the jury to draw a negative inference from the defendant's exercise of a constitutional right. Jones was validly exercising his right of confrontation and the State's commentary did constitute an impermissible use of constitutionally protected behavior. Because the error is of constitutional magnitude it may not be deemed harmless unless the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *State v. Bagwell*, 68 Wash.App. 891, 893, 846 P.2d 587 (1993) (citing *State v. Guloy*, 104 Wash.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986)). We find the prosecutor's comments were harmless beyond a reasonable doubt. The untainted evidence in this case is overwhelming, including an eyewitness account and Jones' own admission that he touched A.

Jones also contends the trial court erred by permitting testimony of Judy Mitchell, the CPS caseworker. An expert may not testify on an ultimate issue of fact based upon the expert's perception of the witness's veracity. *State v. Fitzgerald*, 39 Wash.App. 652, 657, 694 P.2d 1117 (1985);

State v. Alexander, 64 Wash.App. 147, 154, 822 P.2d 1250 (1992). Nor may the expert state an opinion as to the defendant's guilt; such testimony invades the province of the jury to weigh the evidence and decide the credibility of witnesses. *Alexander*, 64 Wash.App. at 154, 822 P.2d 1250; *State v. Madison*, 53 Wash.App. 754, 760, 770 P.2d 662, *review denied*, 113 Wash.2d 1002, 777 P.2d 1050 (1989).

Jones alleges Mitchell's testimony regarding her remarks to A. that "I believe you" and her statement that "I felt that this child had been sexually molested by Donnie at that point" are impermissible opinions as to A.'s truthfulness and Jones' guilt. The "I believe you" statement, however, taken in the context of the surrounding testimony, appears to have been intended to reassure the child in an effort to encourage the child to respond. Moreover, even if the remark would have been the proper subject of an objection, no objection was made and therefore error may not be raised unless it constitutes manifest constitutional error. *State v. Madison*, 53 Wash.App. at 762, 770 P.2d 662. In *Madison*, an expert witness testified to her observations of the complaining witness, and her statements implied her belief in the victim's story. Because the expert did not explicitly state her belief in the victim's story the *Madison* court held the testimony did not constitute manifest constitutional error. *Madison*, 53 Wash.App. at 763, 770 P.2d 662. Similarly, in this case, Mitchell did not expressly state to the jury that she believed A., therefore any error may not be raised for the first time on appeal.

Mitchell's statement that she felt Jones had molested A. is a much more explicit statement of belief in Jones' guilt. The State argues that Jones insufficiently preserved error on this comment because the

objection was inadequate. However, if the ground for objection is apparent from the context, the objection is sufficient to preserve the issue. *State v. Black*, 109 Wash.2d 336, 340, 745 P.2d 12 (1987); *State v. Braham*, 67 Wash.App. 930, 934-35, 841 P.2d 785 (1992). In this case, it is apparent the statement was an opinion as to the guilt of the defendant, which implicitly invades the province of the jury, and the objection was sufficient to preserve the alleged error.

It is well-established that no witness may testify as to an opinion on the guilt of the defendant, whether directly or inferentially.[4] *See State v. Haga*, 8 Wash.App. 481, 492, 507 P.2d 159, *review denied*, 82 Wash.2d 1006 (1973); *Black*, 109 Wash.2d at 348, 745 P.2d 12, *Madison*, 53 Wash.App. at 760, 770 P.2d 662; *Alexander*, 64 Wash.App. at 154, 822 P.2d 1250. Mitchell's statement plainly indicated her opinion that she believed Jones had molested A. Therefore, the trial court's admission of this statement was error. This error is of constitutional magnitude because it invades the province of the jury, therefore it is harmless only if the untainted evidence is so overwhelming that it necessarily supports a guilty verdict. *State v. Carlin*, 40 Wash.App. 698, 703, 700 P.2d 323 (1985). As discussed above, other evidence of Jones' guilt is overwhelming,

---

[4] Testimony suggesting that the accused is a member of a group that has a statistically higher incidence of child abuse is likewise impermissible because of its prejudicial effect. *State v. Petrich*, 101 Wash.2d 566, 576, 683 P.2d 173 (1984); *State v. Braham*, 67 Wash.App. 930, 841 P.2d 785; *State v. Maule*, 35 Wash.App. 287, 293, 667 P.2d 96 (1983); *State v. Steward*, 34 Wash.App. 221, 224, 660 P.2d 278 (1983).

and therefore we find the error was harmless.

Mitchell also testified as to behaviors of A. that were common behaviors of sexually abused children, specifically her propensity to sexually act out and her nightmares. Expert testimony is admissible under ER 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

This rule requires the witness be qualified as an expert, any opinion testimony must be based on a theory generally accepted by the scientific community, and the testimony must be helpful to the fact-finder. *State v. Black,* 109 Wash.2d at 341, 745 P.2d 12. Education and practical experience may qualify a witness as an expert. *State v. Ortiz,* 119 Wash.2d 294, 310, 831 P.2d 1060 (1992). Mitchell's educational background in social work and her years of experience qualify her as an expert; moreover, Jones has not assigned error to her qualification as an expert witness.

An expert's scientific or technical testimony must be based upon a scientific principle or explanatory theory that has gained general acceptance in the scientific community. *State v. Black,* 109 Wash.2d at 342, 745 P.2d 12 (citing *Frye v. United States,* 293 F. 1013, 1014 (D.C.Cir.1923)); *State v. Wilber,* 55 Wash.App. 294, 298, 777 P.2d 36 (1989). The standard has been

fairly stringently applied.[5]

However, if expert testimony does not concern novel theories of sophisticated or technical matters, it need not meet the stringent requirements for general

---

[5] *See State v. Black*, 109 Wash.2d at 346-47, 745 P.2d 12 (rape trauma syndrome is not scientifically reliable method probative to issue of rape); *State v. Wilber*, 55 Wash.App. at 299, 777 P.2d 36 (officer's expert testimony on witness's veracity not scientifically accepted method); *State v. Maule*, 35 Wash.App. at 296, 667 P.2d 96 (caseworker's assertions that certain broad characteristics, such as nightmares, indicate child abuse are insufficient to show scientific acceptance and reliability); *State v. Steward*, 34 Wash.App. at 223-24, 660 P.2d 278 (expert's theory that in his experience most injuries to children are inflicted by mother's boyfriends has insufficient scientific basis). *But see State v. Janes*, 121 Wash.2d 220, 850 P.2d 495 (1993) (testimony on the issue of battered child syndrome is sufficiently accepted to satisfy the *Frye* test); *State v. Ciskie*, 110 Wash.2d 263, 278, 751 P.2d 1165 (1988) (approving testimony on battered woman syndrome to rebut defense theory that victim's behavior was inconsistent with abuse); *State v. Allery*, 101 Wash.2d 591, 597, 682 P.2d 312 (1984) (expert testimony on the battered woman syndrome is admissible, theory is generally accepted in the scientific community); *State v. Petrich*, 101 Wash.2d at 576, 683 P.2d 173; *State v. Claflin*, 38 Wash.App. 847, 852, 690 P.2d 1186 (1984) (allowing testimony that delay in reporting is not unusual in child victims is not abuse of discretion), *review denied*, 103 Wash.2d 1014 (1985); *State v. Mulder*, 29 Wash.App. 513, 515, 629 P.2d 462 (1981) (testimony regarding "battered child syndrome" has sufficient scientific basis).

scientific acceptance. *State v. Ortiz*, 119 Wash.2d at 310-11, 831 P.2d 1060 (expert testimony on tracking suspect not subject to *Frye*). Testimony may be based on training, experience, professional observations, and acquired knowledge. *Ortiz*, 119 Wash.2d at 310, 831 P.2d 1060, *State v. Sanders*, 66 Wash.App. 380, 386, 832 P.2d 1326 (1992). Under this principle, Mitchell's testimony regarding the sexual acting out of abused children and their experiences with night terrors could be deemed proper because an adequate foundation existed in her professional experience and observations and because an observation that a victim exhibits behavior typical of a group does not relate directly to an inference of guilt of the defendant.[6] Moreover, because the testimony is not extremely technical, the jury may judge its reliability and determine how much weight should be given to the testimony. *See Ortiz*, 119 Wash.2d at 311, 831 P.2d 1060.

Logically, the principle articulated in *Ortiz* should apply to expert testimony regarding child abuse victims. However, such an extension of *Ortiz* is inconsistent with this court's opinion in *State v. Maule*, 35 Wash.App. 287, 667 P.2d 96 (1983). In

---

[6] Testimony that certain behaviors or injuries of victims are not inconsistent with abuse in general has been found admissible as not constituting an opinion on the defendant's guilt. *See State v. Sanders*, 66 Wash.App. at 388, 832 P.2d 1326; *State v. Toennis*, 52 Wash.App. 176, 185, 758 P.2d 539, *review denied*, 111 Wash.2d 1026 (1988); *see also State v. Jones*, 59 Wash.App. 744, 749-51, 801 P.2d 263 (1990), *review denied*, 116 Wash.2d 1021, 811 P.2d 219 (1991); *State v. Simon*, 64 Wash.App. 948, 964, 831 P.2d 139 (1991), *aff'd in part and rev'd on other grounds*, 120 Wash.2d 196, 840 P.2d 172 (1992).

Maule, a caseworker testified that sexually abused children exhibited typical behaviors based upon her experience at a sexual assault center. This court held, "[The caseworker's] theory that sexually abused children manifest particular identifiable characteristics was not shown to be supported by accepted medical or scientific opinion." *Maule*, 35 Wash.App. at 295-96, 667 P.2d 96. Moreover, the court noted:

> There is no evidence that [the caseworker] conducted any statistical study or that any other expert in the field made such a study. There is no evidence that people working in the field attach particular significance to one or more characteristics and whether certain broad characteristics noted by [the caseworker], *e.g.*, "nightmares," are, without further explanation, considered adequate indicia of child sexual abuse.

Maule, 35 Wash.App. at 296, 667 P.2d 96. More recent case law has brought into question the prohibition set forth in *Maule*. In *State v. Stevens*, 58 Wash.App. 478, 794 P.2d 38, *review denied*, 115 Wash.2d 1025, 802 P.2d 128 (1990), the court approved the use of expert testimony describing the behaviors of sexually abused children in general. The expert did not testify that the victim in that case fit that profile. *Stevens*, 58 Wash.App. at 497, 794 P.2d 38. The court affirmed the admissibility of the testimony, noting it was not being used to directly prove an element of the crime. The court also relied on *State v. Ciskie*, 110 Wash.2d 263, 751 P.2d 1165 (1988) and held the testimony was relevant to rebut a defense theory that the victims' behavior was caused by traumas other than sexual abuse. The court specifically left undecided the issue of whether such "syndrome" evidence was admissible under *Frye*. *Stevens*, 58 Wash.App. at 497 n. 8, 794 P.2d 38.

Further, in *State v. Cleveland*, 58 Wash.App. 634, 794 P.2d 546, *review denied*, 115 Wash.2d 1029, 803 P.2d 324 (1990), *cert. denied*, 499 U.S. 948, 111 S.Ct. 1415, 113 L.Ed.2d 468 (1991), this court affirmed the admissibility of expert testimony by a family therapist regarding typical behaviors of child abuse. The therapist testified from her own experience with abused children. The testimony was offered to assist the jury in evaluating the victim's testimony. The defense offered testimony that the victim had not reported the abuse, attacking the victim's credibility. The expert did not offer an opinion that the alleged victim had been abused or that the defendant was guilty. The court noted the expert testimony

> was really not an explanatory theory or opinion requiring acceptance by the scientific community by ER 702. [The therapist's] testimony was essentially a description of her personal observations of some of the characteristics of child sex abuse victims. Her observations are comparable to testimony of a physician describing characteristics he has personally observed in his treatment of a particular injury or disease.
>
> (Footnote omitted.)

Cleveland, 58 Wash.App. at 646, 794 P.2d 546.

Testimony of this nature, however, is closely related to generalized profile or syndrome testimony and, if *Ortiz* is applied, the safeguards to ensure the scientific reliability of such testimony are diminished. We note the distinction existing between a caseworker narrowly testifying to the behavior of abused children seen in a specific practice and more generalized assertions as to the

behavior of abused children as a class. Washington has no conclusive precedent regarding the admissibility of generalized sexual abuse "syndrome" testimony under *Frye*.[7] The characterization of such testimony based solely upon the clinical observations of a caseworker is difficult. The appropriateness of characterizing this type of evidence as "scientific" was noted by experts in this area:

> In the context of child sexual abuse litigation--where the concern is reliability of novel forms of evidence--it is appropriate to characterize all of the relevant disciplines as scientific. This characterization has several advantages. First such a characterization acknowledges the scientific element of expert medical and behavioral science testimony. Second, characterizing the disciplines as scientific recognizes that medical and behavioral science testimony based on novel principles raise the concerns discussed above regarding novel scientific evidence. That is, such evidence may over-awe or confuse the jury and may be less accessible to lay analysis than other forms of evidence. Finally, characterizing the disciplines as scientific makes it possible to avoid a hopeless analytical morass. If some forms of medical and behavioral science testimony are scientific and others are

---

[7] The syndrome has been referred to as "Child Sexual Abuse Accommodation Syndrome", or CSAAS (initially described by Dr. Roland Summit in *The Child Sexual Abuse Accommodation Syndrome*, 7 Child Abuse & Neglect 177 (1983). *See* Myers, Bays, Becker, Berliner, Corwin & Saywitz, *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb.L.Rev. 1, 66-68 (1989).

> not, it is necessary to decide which is which. Drawing this distinction is always difficult, sometimes impossible.

Myers, Bays, Becker, Berliner, Corwin & Saywitz, *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb.L.Rev. 1, 21 (1989). As noted by the Maine Supreme Court:

> [T]he anecdotal clinical experience of the witness lacked any evidence of solid empirical research....
>
> In *State v. Lawrence* ... [w]e concluded that to permit jury reliance on unproven scientific techniques to bolster otherwise uncorroborated child testimony would deprive Lawrence of a fair trial.

State v. York, 564 A.2d 389, 390-91 (Me.1989).

We agree that when personal experience is used as a basis for generalized statements regarding the behavior of sexually abused children as a class, the testimony crosses over to scientific testimony regarding a profile or syndrome, whether or not the term is used, and therefore should be subject to the standard set forth in *Frye*.[8] When the testimony is limited to the witness's observations of a specific group, the *Frye* standard is not applicable.

Under *Frye*, generalized testimony regarding a profile of behaviors of victims

---

[8] Nevertheless, some courts have allowed such testimony without addressing its scientific reliability. *See State v. Kim*, 64 Haw. 598, 645 P.2d 1330 (1982); *State v. Middleton*, 294 Or. 427, 657 P.2d 1215 (1983); *State v. Moran*, 151 Ariz. 378, 728 P.2d 248 (1986).

of sexual abuse must be sufficiently established to have gained general acceptance by the scientific community. *State v. Black*, 109 Wash.2d at 342, 745 P.2d 12. Experts and authorities in the field have cautioned against the unfettered admissibility of the child sexual abuse profile testimony. *See e.g.*, R. Levy, *Using "Scientific" Testimony to Prove Child Sexual Abuse*, 23 Fam.L.Q. 383 (1989); McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray Into the Admissibility of Novel Psychological Evidence*, 77 J.Crim.L. & Criminology 1 (1986); Note, *The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims*, 74 Geo.L.J. 429 (1985). The prevalent objection to such testimony is that a general profile of typical behaviors is not specific to sexual abuse, but may be produced by other traumatic events in the life of the child. *Commonwealth v. Dunkle*, 529 Pa. 168, 602 A.2d 830, 834 (1992); *State v. Rimmasch*, 775 P.2d 388, 401 (Utah 1989). *See also* McCord, 77 J.Crim.L. & Criminology at 444-48; Note, 74 Geo.L.J. at 439-443.

Accordingly, a substantial number of courts have noted that expert testimony regarding a profile or syndrome of child sexual abuse victims is not admissible to prove the existence of abuse or that the defendant is guilty. *See State v. Michaels*, 264 N.J.Super. 579, 625 A.2d 489 (1993); *State v. J.Q.*, 252 N.J.Super. 11, 599 A.2d 172 (1991); *Commonwealth v. Dunkle*, 602 A.2d 830; *State v. Rimmasch*, 775 P.2d 388; *People v. Jeff*, 204 Cal.App.3d 309, 251 Cal.Rptr. 135 (1988); *People v. Beckley*, 434 Mich. 691, 456 N.W.2d 391 (1990); *State v. York*, 564 A.2d 389 (Me.1989); *State v. Schimpf*, 782 S.W.2d 186 (Tenn.Crim.App.1989). This evidence has been distinguished from battered child syndrome. *See* 68 Neb.L.Rev. at 67; *State*

v. Rimmasch, 775 P.2d at 400; *Commonwealth v. Dunkle*, 602 A.2d at 835. Such testimony has also been analogized to "rape trauma syndrome" testimony such as that found inadmissible in *Black*. *See Jeff*, 251 Cal.Rptr. at 149; *Beckley*, 456 N.W.2d at 405.

Because the use of testimony on general behavioral characteristics of sexually abused children is still the subject of contention and dispute among experts in the field, we find that its use as a general profile to be used to prove the existence of abuse is inappropriate. However, we agree with the current trend of authority that such testimony may be used to rebut allegations by the defendant that the victim's behavior is inconsistent with abuse. *See e.g. State v. J.Q.*, 599 A.2d at 182, 183 and cases cited therein; *People v. Nelson*, 203 Ill.App.3d 1038, 149 Ill.Dec. 161, 561 N.E.2d 439 (1990); *People v. Beckley*, 456 N.W.2d 391; *People v. Jeff*, 251 Cal.Rptr. 135. We further note that sexual acting out behavior has been viewed as more logically and clinically indicative of sexual abuse than other generalized reactions to emotional traumas such as nightmares and phobic behaviors. *See* 68 Neb.L.Rev. at 59-60.

We find a majority of other jurisdictions have reached a similar resolution with regard to generalized testimony of behaviors of abused children. A number of courts have found that testimony regarding the behaviors of a class of abused children is not sufficiently established to meet the *Frye* standard or an equivalent test for scientific reliability under ER 702. *See People v. Jeff; State v. Schimpf; State v. York; State v. Rimmasch; Commonwealth v.*

Dunkle.[9]

In sum, the use of generalized profile testimony, whether from clinical experience or reliance on studies in the field, to prove the existence of abuse is insufficient under *Frye*.[10] However, such testimony may be used to rebut an inference that certain behaviors of the victim, such as sexual acting out, are inconsistent with abuse.[11]

---

[9] Other courts, however, have found that such "soft" behavioral testimony need not meet the *Frye* test because it is not a novel scientific theory. *See Bostic v. State*, 772 P.2d 1089, 1096 (Alaska App.1989), *rev'd on other grounds*, 805 P.2d 344 (1991); *People v. Beckley*, 434 Mich. 691, 456 N.W.2d 391. Behavioral testimony of sexually abused children has also been held sufficient to satisfy the *Frye* test. *See Ward v. State*, 519 So.2d 1082, 1084 (Fla.App.1988).

[10] Although we are bound by this state's consistent adherence to the *Frye* test, we recognize the difficulties presented when *Frye* is applied to general behavioral testimony of this nature. Determining whether testimony is "scientific" in character is difficult. Recognizing the rigid standard set forth by *Frye*, the United States Supreme Court recently ruled that *Frye* is no longer the standard under the federal rules for admitting expert scientific testimony at trial. *Daubert v. Merrell Dow Pharmaceuticals*, --- U.S. ----, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[11] We do not find this result precluded by *Cleveland* or *Stevens*. The testimony in *Cleveland* was offered to explain the victim's reluctance to report abuse and assist the jury in weighing her testimony. The victim's mother had testified that the victim never reported the abuse and that she was not always truthful. *Cleveland*, 58 Wash.App. at 637, 794

In the case at hand, Mitchell's testimony included generalized assertions about common behaviors of sexually abused children. Her answers exceeded the limitations of her personal experience as set forth in the prosecutor's carefully framed questions. However, Mitchell's testimony regarding sexual acting out was in rebuttal to a defense theory that A.'s sexual behaviors were inconsistent with her allegations of abuse against Jones. Moreover, although the defense objected to the general foundation of the prosecutor's questions, which were not improper in form, Jones failed to object to Mitchell's answers, which exceeded the scope of personal observations. Therefore, we find that he cannot now complain that an inadequate foundation existed for her testimony under *Frye;* that objection should have been made at trial. Therefore, although we find Mitchell's testimony about nightmares during the State's case in chief to be have been improper, the error was not sufficiently preserved.

Jones also claims that the trial court erred by not submitting a "Petrich" instruction to the jury when testimony at trial discussed A.'s hearsay statements about other incidents of touching by Jones. A defendant has a constitutional right to be convicted by a jury that unanimously agrees that the crime charged in the information has been committed. *State v. Kitchen,* 110 Wash.2d 403, 409, 756 P.2d 105 (1988); Wash. Const. art. 1, s 22 (amend. 10) (right to unanimous jury verdict); U.S. Const. amend. 6 (right to jury trial). If the prosecution submits evidence and

---

P.2d 546. In *Stevens,* the testimony was offered to rebut a defense theory that the children's behavior was inconsistent with sexual abuse by the defendant.

testimony of multiple acts, any one of which could support the count charged, the State must either elect one incident to rely on for a conviction or the jury must be instructed that it must unanimously agree on a specific criminal act. *State v. Kitchen,* 110 Wash.2d at 409, 756 P.2d 105; *State v. Petrich,* 101 Wash.2d 566, 572, 683 P.2d 173 (1984). Although Jones did not propose a unanimity instruction at trial, the issue is one of constitutional magnitude because it impinges upon Jones' right to trial by jury and may be raised initially on appeal. *State v. Crane,* 116 Wash.2d 315, 325, 804 P.2d 10, *cert. denied,* --- U.S. ----, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); *State v. Fitzgerald,* 39 Wash.App. 652, 655, 694 P.2d 1117 (1985).

The State argues that it elected the bedroom incident discussed in detail above as the basis for the two counts. Although the bulk of the trial testimony centered around the bedroom incident, and the information submitted by the State relied on the one incident, other incidents were referred to at trial. Moreover, despite the State's assertions, it is not apparent from the record which incident was elected. Indeed, the "to convict" instruction states that the conduct occurred between September 1989 and January 31, 1990. Because witnesses testified to A.'s statements that multiple and distinct incidents had occurred, a unanimity instruction should have been given to avoid this issue.

The State argues that even if a unanimity instruction was required, the error was harmless. The failure to give a unanimity instruction is presumed prejudicial and is not harmless error unless a rational trier of fact could not have a reasonable doubt as to whether the evidence of each incident establishes the commission of the crime. *State v. Camarillo,* 115 Wash.2d 60, 65, 794 P.2d 850 (1990); *State v. Kitchen,* 110

Wash.2d at 411, 756 P.2d 105 (citing *State v. Loehner*, 42 Wash.App. 408, 411, 711 P.2d 377 (1985) (Scholfield, A.C.J., concurring), *review denied*, 105 Wash.2d 1011 (1986)); *State v. Huckins*, 66 Wash.App. 213, 222, 836 P.2d 230 (1992), *review denied*, 120 Wash.2d 1020, 844 P.2d 1017 (1993). The State argues that this case is similar to *Camarillo*, *Allen*, and *Loehner*, where the evidence of the case was solely dependent on the credibility of the victim versus the credibility of the defendant. The evidence in those cases was controverted only by the defendant's denial of the victim's allegations. Therefore, the failure to give a unanimity instruction was harmless on the basis that if a rational trier of fact would have believed the testimony of one incident it necessarily would have no reasonable doubts as to the other incidents because the acts were not distinguishable.

Here, A. testified to only one incident of contact with Jones: the incident on the bed. A.'s testimony stated that no other touches had occurred. This directly contradicts her hearsay statements to Mitchell and Vatne that multiple instances of touching had taken place. However, this testimony regarding other acts was not the focus of the trial. The question becomes one of whether a rational basis existed for jurors to entertain a reasonable doubt as to whether the evidence of each incident established the commission of a crime. Given the paucity of evidence of the other acts, and the fact that the testimony with regard to these acts was hearsay and inconsistent with the victim's trial testimony, we do not believe a rational trier of fact could have found that any other crimes were in fact committed. To put it another way, in this case we do not believe that there was sufficient evidence to go to the jury with respect to the other acts--the evidence was simply not sufficiently substantial to raise this

matter to a multiple acts case.[12] Consequently, the lack of a unanimity instruction does not constitute prejudicial error requiring reversal on the count of first degree child molestation.

Jones also argues that the trial court erred by excluding Jones' testimony regarding his awareness of allegations of sexual abuse by others against A. The testimony was intended to show that Jones was aware of A.'s sexual contact with others and his allegedly innocent intent to understand and correct her during the bedroom incident. Jones argues that such testimony is not hearsay because it was offered to prove Jones' state of mind at the time of the bedroom incident and was not offered to prove the truth of the matter asserted.

Whether a statement is hearsay depends upon the purpose for which it is being offered. If the statement is offered to prove the mental or emotional state of the individual hearing the statement, it is not hearsay because it is not being used to prove the truth of the matter asserted. *State v. Hamilton*, 58 Wash.App. 229, 231, 792 P.2d 176 (1990); *State v. Mounsey*, 31

---

[12] It is noteworthy that in both *State v. Kitchen*, 110 Wash.2d at 411, 756 P.2d 105, and *State v. Crane*, 116 Wash.2d at 325, 804 P.2d 10, the court restricts the application of *Petrich* to those cases where multiple acts are *alleged*. While it is not all that clear here, this was not a case where the State alleged multiple acts. What the State did with respect to the evidence of multiple acts may well have been improper for other reasons as discussed above but it did not change the focus of this particular case from the bedroom incident insofar as the *Petrich* rule is concerned.

Wash.App. 511, 522 n. 3, 643 P.2d 892, *review denied*, 97 Wash.2d 1028 (1982); 5 K. Tegland, Wash.Prac. s 336 (3d ed. 1989). *See also State v. Smith*, 56 Wash.App. 909, 911, 786 P.2d 320 (1990). In such a case, the statement is admissible but a proper limiting instruction should accompany the testimony. *Hamilton*, 58 Wash.App. at 232, 792 P.2d 176. Because the testimony in this case was offered to prove Jones' intent during his interaction with A., it was offered for a nonhearsay use and should not have been excluded on that basis.

However, the trial court's exclusion of this testimony is alternatively supported on other grounds. A trial court's exclusion of evidence may be upheld on any proper basis; the trial court's erroneous determination does not necessarily require reversal. *State v. Markle*, 118 Wash.2d 424, 438, 823 P.2d 1101 (1992); *State v. Rivas*, 49 Wash.App. 677, 688, 746 P.2d 312 (1987). The evidence at issue is highly prejudicial. ER 403 allows the exclusion of evidence if its probative value is substantially outweighed by its prejudice. Here, the evidence of prior unsubstantiated allegations of abuse against A. would be very prejudicial because it could imply that A.'s sexual acting out with others indicated a propensity for sexual contact. The value of the evidence to prove Jones' state of mind is questionable; as the State points out, the issue of A.'s sexual acting out was discussed in other testimony and Jones' awareness of that acting out was brought out in direct examination by his counsel. The trial court's evidentiary rulings are reversible only for a manifest abuse of discretion. *Markle*, 118 Wash.2d at 438, 823 P.2d 1101 (citing *State v. Mak*, 105 Wash.2d 692, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986)). Here, the trial court's determination may be upheld on the basis that the evidence was unduly prejudicial, thus no manifest abuse

of discretion exists.

Jones claims that his convictions for both offenses are a violation of the prohibition against double jeopardy.[13] Jones also alleges that the trial court erred in finding that the two charges did not merge for purposes of sentencing. Two offenses are considered to be the "same offense" for double jeopardy purposes if the offenses are

> the same in law and in fact. If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.

In re Fletcher, 113 Wash.2d 42, 47, 776 P.2d 114 (1989) (quoting *State v. Vladovic*, 99 Wash.2d 413, 423, 662 P.2d 853 (1983)). The underlying offenses for Jones' convictions are not the "same offense" under the principle set forth in *Fletcher*, however. Child molestation requires that the offender act for the purpose of sexual gratification,[14] an element not included in

---

[13] The Fifth Amendment provides that no individual shall be "subject for the same offense to be twice put in jeopardy of life and limb." U.S. Const. amend. 5.

[14] RCW 9A.44.083 provides in part:

> "(1) A person is guilty of child molestation in the first degree when the person has sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.010

first degree rape of a child, and first degree rape of a child requires that penetration or oral/genital contact occur,[15] an element not required in child molestation. Each offense requires the State to prove an element that the other does not, and therefore the offenses are not the "same offense" for double jeopardy purposes.

Under this same analysis, child molestation does not merge as a lesser included offense of rape of a child.[16] An

---

provides in part:

"(2) 'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party."

[15] RCW 9A.44.073 provides in part:

"(1) A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim."

[16] The analysis of this issue is further complicated, however, by the fact that the trial court erroneously instructed the jury that child molestation was a lesser included offense of first degree rape of a child. Jones has not assigned error to this instruction, nor did Jones object to its submission at trial. In fact, Jones argues that child molestation is a lesser included offense of rape of a child. A lesser included offense instruction that is not excepted to at trial becomes the law of the case; any error arising from the instruction is invited error and is harmless beyond a

instruction on a lesser included offense is proper when "each element of the lesser offense is a necessary element of the offense charged" and the evidence supports an inference that the lesser offense was committed. *State v. Speece*, 115 Wash.2d 360, 362, 798 P.2d 294 (1990). Because child molestation requires an element of sexual gratification, it is not a lesser included offense of first degree rape of a child. *State v. Saiz*, 63 Wash.App. 1, 5, 816 P.2d 92 (1991). *See also State v. Markle*, 118 Wash.2d at 436, 823 P.2d 1101 (offense of indecent liberties, which requires element of sexual gratification, does not merge with first degree statutory rape as lesser included offense); *State v. Walden*, 67 Wash.App. 891, 894, 841 P.2d 81 (1992) (fourth degree assault is not lesser included offense of second degree rape because assault requires proof of intent).

Jones argues that to avoid double jeopardy, *State v. Noltie*, 116 Wash.2d 831, 809 P.2d 190 (1991) and *State v. Newman*, 63 Wash.App. 841, 850, 822 P.2d 308, *review denied*, 119 Wash.2d 1002, 832 P.2d 487 (1992) require the State to submit a unanimity instruction when the same evidence is presented to support both counts. *Noltie* and *Newman* are inapposite on double jeopardy grounds. In *Noltie*, the State charged the defendant with two separate instances of statutory rape, which were legally identical, and submitted a unanimity instruction. The Supreme Court recognized that the two incidents were not the same in fact, and the unanimity instruction ensured that the jury would rely on separate evidence for each count. Likewise, in *State v. Newman* the defendant was charged with multiple acts of statutory rape, which

---

reasonable doubt. *State v. Mak*, 105 Wash.2d at 748-49, 718 P.2d 407.

were legally identical. The unanimity instruction ensured that the jury find factual distinctions between the separate counts. Here, as discussed above, the two offenses in this case are legally and factually distinct, even though both may have occurred during the same incident. Therefore the failure to provide a unanimity instruction did not violate the prohibition against double jeopardy or the doctrine of merger.

Overall, the procedures followed at trial in this case leave much to be desired. The evidence was substantial, however, and included not only the victim's testimony but an eyewitness account of the incident and an admission by Jones that he touched A. We do not find that the cumulative effect of the errors deprived Jones of his right to a fair and impartial jury trial. *Cf. State v. Alexander*, 64 Wash.App. at 154, 822 P.2d 1250.

Accordingly, we affirm the convictions.

BAKER and KENNEDY, JJ., concur.